Central Law Journal.

ST. LOUIS, MO., JULY 13, 1900.

The questions involved in the struggle for the Kentucky governorship have been finally settled by the Supreme Court of the United States on a writ of error to the Kentucky Court of Appeals. The result, from a legal point of view, was not surprising. The court dismissed the writ, holding, in effect, that under the circumstances of the case it has no jurisdiction to review the action of the State court, either on the ground of the deprivation of rights without due process of law or of the violation of the guarantee of a republican form of government. The court laid down at the outset the broad, general doctrine that it is essential to the independence of the States and to their peace and tranquility that their power to prescribe the qualifications of their own officers, the tenure of their offices, the manner of their election and the grounds on which, and the tribunals before which, and the mode in which, such elections may be contested should be exclusive and free from external interference, except so far as plainly provided by the constitution of the United States, and that where controversies over the election of State officers have reached the State courts in the manner provided, and have been determined in accordance with State constitutions and laws, the cases must necessarily be rare in which the interference of the federal supreme court can be properly invoked.

The court, speaking through Chief Justice Fuller, pointed out that for many years the constitution of Kentucky has provided that contested elections for governor and lieutenant-governor shall be determined by the general assembly, and that the highest court of the State has often held, and in the latest contest has again declared, that under the provisions of the State constitution the power of the general assembly to determine the result is exclusive, and that its decision is not open to judicial review. The State court of last resort held that the office of governor was not property under the constitution of Kentucky, and that the decision of the contested elections did not deprive the plaintiffs in error of any preexisting right. It took the view that the mode of contesting elections was part of the machinery, and hence the rights of the officer who held the certificate of the State board of canvassers were provisional or temporary until the determination of the result of the election as provided in the constitution; and upon that determination, if adverse to him, they ceased altogether. In fact, the statute provided that when the incumbent was adjudged not to be entitled his powers "should immediately cease," and under the constitution the holder of the certificate held it for the time being subject to the issue of a contest, if initiated. The supreme court held that the nature of a public office is, generally speaking, inconsistent with either a property or a contract right, and that the Kentucky Court of Appeals, in declining to go behind the tribunal vested by the State constitution and laws with the ultimate determination of the right to the offices, had denied no right secured by the fourteenth amendment to the federal constitution.

The second point discussed by the court was as to the question whether the records disclosed any violation of the guarantees of a republican form of government contained in article IV of the constitution of the United States. In passing on this point the court said that it was long since settled that the enforcement of this guarantee belonged to the political department. It cited the great case of Luther v. Borden, where it was held that the question which of two opposing governments of Rhode Island was the legitimate one was a question for the determination of the political department; that when that department had decided the courts were bound to take notice of that decision and follow it, and further, that as the Supreme Court of Rhode Island had decided the point, the well-settled rule applied that the courts of the United States should adopt and follow the decisions of the State courts on questions which concern merely the constitution and laws of the State.

Applying the doctrine of this case to that before it, the court said that the commonwealth of Kentucky was in full possession of its faculties as a member of the Union, and that no exigency has arisen requiring the in-

terference of the general government to enforce the guarantees of the constitution. In the eye of the constitution the legislative, executive and judicial departments of the State were peacefully operating by the orderly and settled methods prescribed by its fundamental law, notwithstanding there might be difficulties and disturbances arising from the pendency and determination of these contests. The very case before the court, it said, showed this to be so, for the parties who asserted that they were aggrieved by the action of the general assemby properly sought the only remedy which under the law was within their reach. That this proved ineffectual, even though their grounds of complaint might have been, in fact, well founded, was the result of the constitution and laws under which they lived and by which they were bound, and any remedy beside that was to be found in the august tribunal of the people, which was continually sitting and over whose judgment on the conduct of public functionaries the courts exercised no control. Three of the judges of the court filed dissenting opinions, but only one of these contended that the decision of the Kentucky Court of Appeals should be reversed.

NOTES OF IMPORTANT DECISIONS.

LANDLORD AND TENANT—RIGHT TO MANURE.—In Taylor v. Newcomb, decided by the Supreme Court of Michigan, it appeared that the owner of a farm sold it, and leased the barns and barnyards thereon of his grantee. At the time of the sale there was a quantity of hay and straw in the barn belonging to the grantor, which he fed to his stock on the leased premises after the sale. It was held that the manure made on such premises was personal property belonging to the lessee, as manure is only a part of the realty when it results from a consumption of the product grown thereon. The court said in part:

"The great weight of authority in this country sustains the rule that, as between landlord and tenant, manure made on the farm by the cattle of the lessee, which is made from the products of the farm, and as a result of the consumption of its produce thereon, becomes a part of the realty. Tyler, Fixt. 356; 1 Washb. Real Prop. 13; Kittredge v. Woods, 3 N. H. 593; Lassell v. Reed, 6 Greenl. 222; Middlebrook v. Corwin, 15 Wend. 169; Daniels v. Pond, 21 Pick. 371. The rule as stated in Tyler on Fixtures is as follows: 'The rule of law may, therefore, be safely declared that manure made upon a farm, or gathered in therefrom, and produced mainly from the pasturing of sheep, cattle, and horses on its succulent vegetables and grasses, or other products of the farm, in the absence of any stipulation or custom to the contrary, belongs to the farm, and cannot be legally removed therefrom by the tenant. But if the manure were not produced directly or indirectly from the land, and were in no sense the product of agricultural demised premises,—such as accumulates in livery stables and the like,—it is no part of the realty, and may be removed by the tenant at the close of his term.' Defendant's counsel does not controvert this general rule, but contends that in this case the manure never became a part of the realty, for the reason that on the sale of the land to complainant the straw, hay, and cornstalks remained the property of defendant, to do with as he pleased; that he might have removed them from the premises without let or hindrance; that the manure was not produced, directly or indirectly, from the land while the defendant was tenant of complainant. The circuit judge adopted this view, and we think he is sustained by the logic of the cases. It is held in numerous cases that, where the manure is made, not from the products of the farm, but substantially like making it in a livery stable, the tenant is entitled to it. Needham v. Allison, 24 N. H. 355; Fletcher v. Herring, 112 Mass. 382. In the case of Pickering v. Moore, 67 N. H. 533, 32 Atl. Rep. 828, 31 L. R. A. 698, it was said by Carpenter, J.: 'No rule of good husbandry requires the tenant to buy hay or other fodder for consumption on the farm. If, in addition to the stock maintainable from its products, he keeps cattle for hire, and feeds them upon fodder produced by purchase or raised by him on other lands, the landlord has no more legal or equitable interest in the manure so produced than he has in the fodder before it is consumed. It is not made in the ordinary course of husbandry; it is produced in a manner substantially like making it in a livery stable.' In the present case plaintiff had no interest in the fodder which was fed out by defendant. Her rights in it were not in any way different than they would have been in fodder purchased by the tenant. When the manure was made, the rights of the defendant were those of a tenant in the buildings only. His rights to pasturage terminated when winter set in. The manure was produced substantially like making it in a livery stable. See, further, Gallagher v. Shipley, 24 Md. 418. It should be stated that the record shows that there was no manure on the premises when sold. The rights of a purchaser to the manure accumulated on agricultural lands, is, therefore, in no way involved."

DECEIT—CONVEYANCE TO WIFE—FALSE REPRESENTATIONS.—The Supreme Court of Rhode Island decides in Hunt v. Baker, 46 Atl. Rep. 46, that where plaintiff, not knowing that certain land belonged to defendant's wife, and that the record title thereto stood in her name, was in-

duced, by defendant's false representations that he was the owner of the land, to contract with him to furnish heating apparatus for a house situated thereon, a refusal, in an action for such deceit, to rule that the recording of the deeds was constructive notice as to the true ownership of the property, was proper, since plaintiff was entitled to rely on the husband's statement. The court says:

"The question, therefore, presented by the exceptions, is whether one to whom a representation is made as to the ownership of land, who does not know the representation to be untrue, and who, relying on its truth, has acted to his loss, is precluded from maintaining an action for the deceit because the true state of the title to the land might have been ascertained by him by an examination of the land records. The defendant's contention is that, as the record affords constructive notice to all persons of the true state of the title, it is incumbent on him to whom such representation is made to consult the record, and if he fails to do so he is guilty of negligence, and so cannot recover. We do not think that this contention can be sustained. The cases relied on by defendant in support of it are not cases of constructive notice, but cases in which the representations made were affirmations of the seller of property as to quality, value, former offers, and the like, which involved, not so much facts, as matters of opinion and judgment, and which, as said in Brown v. Castles, 11 Cush. 350, it has always been understood, the world over, are to be distrusted. On such statements a person has no right to rely, and hence if he acts upon them without inquiry, and is deceived, he is without remedy, unless he has been prevented from making inquiry by the fraudulent conduct of the other. Where, however, the representation is a statement amounting to the positive assertion of an existing fact, the person to whom it is made has a right to rely upon its truth, and, having the right to rely upon it, is not put to his inquiry; and, therefore, if the representation be untrue, and he is deceived thereby to his injury, negligence which will preclude his recovery cannot be predicated on his failure to make the inquiry. In Mead v. Bunn, 32 N. Y. 280, the court remarks: 'Every contracting party has an absolu e right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual engagement; and he is under no obligation to investigate or verify statements, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith.' Accordingly it was held in David v. Park, 103 Mass. 501, that a distinct statement of fact by a seller, known to be false, with intent to deceive the buyer, on which the buyer acts to his injury, will sustain an action of deceit, even if the buyer might have discovered the fraud by searching the records of the patent office. So, too, it was held in Dodge v. Pope, 93 Ind. 481, that one who represents that a mortgage which he offers for sale is the only mortgage of record is bound by such representation, although an examination of the record would have disclosed the existence of a prior mortgage. See, also, to the same effect, Tyner v. Cotter, 67 Wis. 482, 30 N. W. Rep. 782; Evans v. Forstall, 58 Miss. 30; Fargo Gas & Coke Co. v. Fargo Gas & Electric Co., 4 N. D. 219, 59 N. W. Rep. 1066, 37 L. R. A. 593, in which the question is fully considered, and numerous cases are collected. And see, further, Ward v. Wiman, 17 Wend. 193, in which it is held that case lies for deceitful and false representations respecting the title to land, in the sale of it; and this, too, though the deed contains covenants of title,—the purchaser having the right to treat the deed as a nullity, and maintain his action for deceit."

MUNICIPAL CORPORATION — FIRE DEPARTMENT—NEGLIGENCE.—In Saunders v. City of Ft. Madison, decided by the Supreme Court of Iowa, it appeared that while driving along the street of defendant city, plaintiff's horse, being frightened by the employees of defendant's of the fire department, ran off, injuring plaintiff, who sued to recover for her injuries. It was held that there could be no recovery, as the employees were public officers engaged in a public duty at the time of the accident. The court said:

"Defendant's demurrer was on the grounds that it is not liable for the action of its agents, servants, or firemen who had control of the fire apparatus, and that in no event is it liable for the willful and malicious acts of its agents or servants while handling fire apparatus. This demurrer was sustained, and the question for solution is, is defendant liable for the negligent or careless acts of its agents and servants acting in the line of their duty in caring for the fire apparatus? The doctrine of *respondeat superior* is not applicable to the acts or negligence of all agents and servants of a municipal corporation. Such a corporation, no doubt, has power to purchase and own fire apparatus, and may in some instance appoint the agents who are to manage and care for the same; but it is not, as a general rule liable for the negligence or carelessness of such agents, for the reason that the service performed is one in which it has no particular interest, and from which it derives no special benefit in its corporate capacity. Such employees are not agents and servants of the city, but act as officers charged with a public service for whose negligence no action will lie against the city. Where the powers conferred are governmental in nature, the city cannot be made liable for execution thereof. Ogg v. City of Lansing, 35 Iowa, 495; Calwell v. City of Boone, 51 Iowa, 687, 2 N. W. Rep. 614. In the absence of express statute, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair fire apparatus owned by them, than in the case of public buildings. Hafford v.

City of New Bedford, 16 Gray, 297; Eastman v. Meredith, 36 N. H. 284. In Burrill v. Augusta, 78 Me. 118, 3 Atl. Rep. 177, it appeared that the officers of the fire department carelessly and negligently left a fire engine standing within the limits of a public street in the defendant city, and, while so standing, drew the fire, and permitted the steam to escape with great noise, whereby plaintiff's horse was frightened and ran away, and plaintiff was thrown to the ground and injured. It was held that she could not recover, on the theory that these officers were performing a public duty, acting on their own responsibility, and that they were not officers and agents of the municipality, in such sense as that defendant was responsible for their acts. Dodge v. Granger (R. I.), 24 Atl. Rep. 100, 15 L. R. A. 781, is another case directly in point. There the members of the fire department left a ladder truck standing so that a ladder projected across the sidewalk in front of an engine house, in consequence of which a passer-by was injured. The city was held not liable, because the members of the fire department were public officers, for whose acts the city was not liable. It was also held that it was the duty of the fire department to take care of its apparatus and keep it in proper condition for use, and that in doing this work it was performing the same duty as when actually engaged in extinguishing fires. Liability of the city for unnecessarily obstructing the street was conceded, but the case did not show any negligence in this respect. Wild v. Paterson, 47 N. J. Law, 406, 1 Atl. Rep. 490, and Welsh v. Village of Rutland, 56 Vt. 228, also involved liability of the city for the negligence of its officers and agents in keeping fire apparatus in good condition and repair; and in each case the city was held not liable for injuries growing out of its negligence in this respect. Negligence of a fireman in opening a door of an engine house so as to strike a passer-by on the sidewalk does not render the city liable. Kies v. City of Erie, 135 Pa. St. 144, 19 Atl. Rep. 942. Acts of a voluntary association of firemen are to be regarded like those of paid firemen, in respect to the liability of a city. Torbush v. City of Norwich, 38 Conn. 225, 9 Am. Rep. 395. The following cases also add support to our conclusions: Smith v. City of Rochester, 76 N. Y. 507; Thomas v. City of Findlay, 6 Ohio Cir. Ct. Rep. 241; Gillespie v. City of Lincoln (Neb.), 52 N. W. Rep. 811, 16 L. R. A. 349; Pettingell v. City of Chelsea (Mass.), 37 N. E. Rep. 380, 24 L. R. A. 427. The Nebraska case is quite in point, and, following the general tenor of the authorities, it holds that a city is not liable where the injury complained of is due to the negligence of the driver of a ladder truck while exercising a team of horses belonging to the fire department of the city."

JUDGMENT—RES JUDICATA.—In Traflet v. Empire Life Ins. Co., 46 Atl. Rep. 204, decided by the Supreme Court of New Jersey, it appeared that an intestate died in New Jersey, leaving a life insurance policy, issued in New York by defendant company, payable to his executors, administrators and assigns, and not liable, under the law, for his debts. On the widow's renunciation and petition plaintiff was appointed administrator in New Jersey, submitted proofs of loss to defendant company and demanded payment. Afterwards the widow took out letters in New York and brought suit against defendant, and plaintiff, refusing to intervene, though notified, commenced an independent action against defendant. It was held that, the New York court having first obtained jurisdiction, its judgment could be pleaded in bar to plaintiff's action. The court said in part:

"The policy of insurance was a contract made in the State of New York. The amount due on this policy was at the time of the death of the deceased an asset of his estate in the State of New York. The letters of administration issued by the surrogate in New York were duly issued. Whether they are considered as original letters of administration, or administration ancillary to the primary administration in this State, is of no importance. Having been issued by competent authority in that State, the defendant could not challenge the right of the New York administratrix to sue. The New York administratrix, with respect to this cause of action in New York, was the legal representative of the deceased, and not the administrator appointed in this State. The contention on the part of the company is that the payment in satisfaction of this policy in New York is a complete bar to any subsequent suit in this State. If the deceased had his domicile in this State, any personal estate of which he died possessed would be distributed under the laws of this State; but, with respect to assets which were to be collected in another State, letters of administration granted by the courts of this State will be of no avail. To sue for and reduce into possession assets in another jurisdiction, letters of administration in that jurisdiction were necessary, although the assets, when collected, would be transmitted to the administrator in this State, to be distributed under our laws. The New York courts had, unquestionably, jurisdiction of the suit that was brought against the defendant to recover this money, and the suit brought by the New York administrator was first in point of time. The subsequent suit by the administrator in this State was also in all respects regular. Process having been served on the defendant in this State, the court in which this suit was brought had jurisdiction of this cause of action. The court in New York and the court in New Jersey having each jurisdiction over the same cause of action, these proceedings are subject to the well-settled rule in judicial proceedings, that, where there is a jurisdiction in two courts, whether they be courts of the same State or courts of different States, the jurisdiction of the court which is first in time will prevail. The pendency of a suit in a foreign State cannot be pleaded in

abatement to a subsequent suit for the same cause of action in a court of this State, the remedy being by an application for a stay. Kerr v. Willetts, 48 N. J. Law, 78, 2 Atl. Rep. 782. But, when the suit in another State has proceeded to final judgment, the judgment may be pleaded in bar. Barnes v. Gibbs, 31 N. J. Law, 317, is directly in point. The plaintiffs in that case on the 12th of July, 1864, brought suit against the defendant in the Supreme Court of New York to collect certain moneys alleged to be due them. After the commencement of the suit in New York, namely, on the 20th of October, 1864, the plaintiffs brought suit against the defendant for the same debt in the circuit court of the county of Essex. Judgment was entered in the New York suit in favor of the plaintiffs on the 24th of January, 1865. The defendants pleaded in bar to the suit in this State the judgment recovered in New York, and that plea was sustained by this court. The situation of the parties in the case just cited is in all material respects the same as the situation in the present case, and controlled by that precedent conclusive effect must be given to the judgment in New York as a merger of the cause of action which is common to both suits. The decisions of the courts of New York are to the same effect. In Sulz v. Association, 145 N. Y. 563, 40 N. E. Rep. 242, 28 L. R. A. 379, it was held that a suit pending by a foreign administrator who has first duly commenced an action upon a policy of insurance upon the life of the deceased by service of process as prescribed by the laws of this State, is a bar to the second action upon the policy in the courts of New York. It appears that, by the practice in New York, proceedings by the way of interpleader may be had to settle the rights of conflicting claimants to the same fund. Before the administrator in this State could have assumed the *status* of a claimant, it would have been necessary that he should have obtained capacity to sue in that court. The defendant, pending the New York suit, notified the administrator in this State of the fact before judgment in that court. Having done this, the defendant did all that was necessary. The conflict between the administration in this State and the administration in New York, owing to the conduct of the widow in inducing the administrator here to take out letters, and afterward taking out letters herself in New York, cannot be permitted to prejudice or affect the interests of the defendant. If the administration in New York can be regarded as ancillary to the prior administration in this State, and the money in question is required to be distributed under the laws of this State, the remedy of the administrator in this State is to resort to the courts of New York."

HAS THE GARNISHING CREDITOR A SPECIFIC LIEN?

One who merely reads what has been written on this topic might suppose that no legal question could be more involved in conflict and inconsistent decisions. Judges and text-writers make statements diametrically opposed to each other, and defend them with a zeal which demonstrates the strength of their convictions. But every argument they make and every case they cite or decide, shows the natural limitations of the propositions which they assert in round unqualified terms. When the decided cases are critically examined to ascertain the questions presented for decision, and we consider the answers given to questions, the mists begin to dissolve and the decisions are seen to be in harmony. In his work on Attachment, Judge Drake says: "Garnishment is an effectual attachment of the effects of the defendant in the garnishee's hands, differing in no essential respect from attachment by levy, except, *as is said*, that the plaintiff does not acquire a clear and full lien upon the specific property in the garnishee's possession, but only such a lien as gives him the right to hold the garnishee personally liable for it or its value."[1] (The italics are mine.) Judge Drake was too careful a writer not to see the difference between *dictum* and decision. He does not entirely indorse the statement. Judge Wade is less guarded in his statements on this point. He says: "It differs from attachment in two important particulars: (1) Its validity does not depend on the officer's taking possession; (2) it creates no specific lien upon the defendant's property in favor of the plaintiff; * * * instead of the specific lien the liability of the garnishee is substituted."[2] These propositions are asserted and defended in such cases as McGarry v. Lewis Coal Co.,[3] in which a garnishing creditor brought a suit for conversion against an innocent purchaser for value of the steam tug in the garnishee's hands at the time the garnishment was served. It was very properly held that, buying from the principal debtor who owned the tug, and at the same time receiving possession without any notice of the garnishment or objection from the garnishee, the purchaser ac-

[1] Drake on Attachment, § 453.
[2] Wade on Attachment and Garnishment, § 325.
[3] 93 Mo. 237, 6 S. W. Rep. 81, 3 Am. St. Rep. 522.

quired title against the prior garnishing creditor, whose only recourse now was against the garnishee for the value of the property thus wrongfully released. How a different conclusion could have been reached in such a case is hard to conceive. If one should purchase property under similar circumstance from an execution or attachment debtor after a levy and release by the sheriff and then should be sued in trover by the execution or attachment creditor, the result must be the same. I have searched the books diligently many times during the past year for a case presenting this question, and as yet have been unable to find any; but *dicta* are common to the effect that the execution creditor's recourse is only against the sheriff for the wrongful release. Another case much relied upon is Walcott v. Keith.[4] In this case one who had received goods in pledge with power of sale and application of the proceeds to secure him as indorser of the note of the owner, brought trover against one of the owner's creditors on whose attachment the goods had been taken from the possession of the pledgee, and who had on demand refused to order the release of them. The principal defenses were (1) that there was not sufficient proof of demand before suit brought, and therefore no proof of conversion; and (2) that plaintiff's special property was not sufficient to enable him to maintain the action. Both of these contentions were decided against the defendant; and, in deciding the second one ,although no point appears to have been made of the fact by counsel in their brief, the court said that no objection to maintaining the action existed by reason of the fact that, before the attachment was levied and before plaintiff received the goods in pledge, the person from whom he had received them had been summoned as garnishee of the attachment debtor at the suit of another creditor. The court goes on to say that the garnishing creditor acquired no lien by his process, and the garnishee had waived his right by voluntary release of the property to the plaintiff. All this is aside from the case before the court, and entirely unnecessary to the decision reached, as must clearly appear to the merest tyro in judicial discussions.

That the garnishing creditor acquires no specific lien has also been asserted in dismissing a petition in the nature of a bill in equity, filed by the garnishing creditor, asking that a receiver be appointed to take possession of the property in the possession of the garnishee.[5] But in these cases it is intimated that the relief would have been given if the complainants had alleged that the garnishee was insolvent and was disposing of the property, which looks very much like a recognition of a specific lien.[6] A garnishee surrendered goods in his possession to a person who had a mortgage on them, with right of possession when the garnishment was served; but while he retained them the principal defendant gave a second mortgage on them. Later, the garnishing creditor filed a petition in the nature of a bill in equity, making all interested persons parties, and asking that the proceeds of the property after payment of the first mortgage be applied on his judgment. The court gave the surplus to the second mortgagee, because under the law in that State at that time a mortgagor has no interest in the property liable to process, citing a case in which mortgaged property was levied on and a second mortgage given by the mortgagor while the property was in the possession of the sheriff, and adding: "It was there held that the levy of the writs created no lien. In this case if the garnishees had surrendered the property to the officer who served the writ, the latter could have acquired no lien under the rule of the case last cited. Under other decisions of this court no lien on property of this kind can be acquired by

[4] 22 N. H. (2 Foster) 196.

[5] McConnell v. Denham, 72 Iowa, 494, 34 N. W. Rep. 298; Silverman v. Kuhn, 53 Iowa, 436, 5 N. W. Rep. 523. Land being attached in an action against the legal owner's grantor, and the legal owner and his tenants being summoned as garnishees, a petition was filed alleging that the garnishees were insolvent, and asking that a receiver be appointed to rent the land and collect the rents till the cause and rights of the parties could be adjudicated. The petition was denied on the ground that it sought the benefits of a creditors' bill. "It is the general rule that such a bill cannot be maintained until judgment has been obtained in the principal action." The statement is also made that no lien is acquired by the garnishment. Clark v. Raymond, 84 Iowa, 251, 50 N. W. Rep. 1068, 86 Iowa, 661, 53 N. W. Rep. 354.

[6] An insurance company and the assignee of the policy being garnished after loss, the assignee gave orders on the fund, and the court held that she was a proper person to summon as garnishee, but had no power by such orders to dispose of the fund and compel the creditors to take a merely personal judgment against her, for which reason the fund paid into court by the insurance company was awarded to the gar-

process of garnishment."[7] In a later case in the same court, the mortgagee in possession being the garnishee, the sheriff took the property from the garnishee on an attachment, depositing the amount of the mortgage. The court held the garnishee to have a lien over and above his mortgage to the amount of the garnishing creditors' demand, and denied the attaching creditors' petition for foreclosure of the mortgage for their benefit.[8]

A creditor summoned the secretary of a corporation as garnishee, intending thereby to attach stock of the corporation belonging to the debtor. Judgment for the plaintiff was reversed, on appeal by an intervening claimant, because the statute provided that corporate shares might be attached by delivering a copy of the writ to the secretary and informing him of the levy, etc. "This mode has not been adopted in the present case." The court, therefore, declared the proceeding void, but volunteered to add that "whenever the attachment by garnishment is proper and is adopted no lien on property is thereby obtained."[9] One of the most detailed statements of the doctrine that the garnishing creditor acquires no lien is found in Citizen's State Bank v. Council Bluffs Fuel Co.,[10] in which the principal question was whether the *bona fides* of a transfer could be tested by garnishing the assignee; and a verdict against the garnishee on the ground that the assignment was fraudulent was sustained.

Another case frequently cited to the same effect is Johnson v. Gorham,[11] in which the proceeds of property levied on under execution were awarded in an action against the sheriff for refusal to apply the proceeds of the property to the satisfaction of the execution. The sheriff defended on the ground that he found the goods in the hands of a custodian who had been summoned as garnishee therefor on a judgment in favor of another creditor, and the sheriff asked the court to determine who was entitled to the proceeds. The decision in favor of the levying creditors was affirmed, the court saying: "The service of a copy of execution and notice of garnishment upon a third party constitutes no lien on property of the debtor in his hands *capable of manual delivery*. It is clear, therefore, that plaintiff was entitled to recover from the sheriff so much of the proceeds of the sale as was sufficient to satisfy his judgment." That my italics show the reason for the decision is demonstrated by a later decision by the same court, in which judgment for defendant was affirmed in an action by mortgagees of a growing crop against a sheriff for seizing the matured crop, under execution on a judgment in an action by attachment, in which the sheriff had served the attachment by giving a copy of it to the attachment defendant, who was in possession. He executed the mortgage later. The attachment in this manner was sustained because the property was, within the meaning of the code, "other personal property *not capable of manual delivery*." "Personal property not capable of manual delivery which is in the hands of the defendant to the attachment is as much liable to attachment as if in the hands of a third person."[12]

The garnishing creditor cannot recover in an action against one to whom the garnishee has paid money for the defendant's benefit after the garnishment was served, for the defendant owns nothing specific in the garnishee's hands, and the payment does not render the garnishee any less a debtor, so far as the garnishing creditor is concerned;[13] and for the same reason a court of equity will not enjoin the garnishee from making the payment.[14] These cases are also cited to the effect that the garnishing creditor acquires no specific lien. This deduction is so unwarranted that no answer is necessary.

Thus we have nearly completed the long list of cases cited to the effect that the garnishing creditor's lien is not specific, and

nishing creditor to the exclusion of the claimant to whom the orders were given, the assignment being fraudulent. Shaver Wagon & Carriage Co. v. Halsted, 78 Iowa, 730, 43 N. W. Rep. 623.

[7] Booth v. Gish, 75 Iowa, 451, 39 N. W. Rep. 704. This case is frequently cited to support the claim that the garnishing creditor acquires no specific lien, but the decision was merely that defendant had no interest liable to process.

[8] Buck-Reiner Co. v. Beatty, 82 Iowa, 352, 48 N. W. Rep. 96.

[9] Mooar v. Walker, 46 Iowa, 164.

[10] 89 Iowa, 618, 57 N. W. Rep. 444.

[11] 6 Cal. 195, 65 Am. Dec. 501.

[12] Raventas v. Green, 57 Cal. 254.

[13] Hulley v. Chedic, 22 Nev. 127, 58 Am. St. 729, 36 Pac. Rep. 783. See also Corey v. Webber, 96 Mich. 357, 55 N. W. Rep. 982; Funkhouser v. How, 24 Mo. 44; Haynes v. Gates, 39 Tenn. (2 Head) 598.

[14] Pelley v. Dunlap Hardware Co., 99 Ga. 300, 25 S. E. Rep. 697.

have found them invariably without bearing on the question. But there are a few cases which give color to the doctrine and cannot be thus brushed aside with a wave of the hand. Bills filed by garnishing creditors to set aside conveyances of property in the hands of the garnishee as in fraud of creditors have been dismissed on the ground that the creditor has made no levy; and, therefore, has no interest in or lien on the property to enable him to attack the transfer.[15] These decisions might have been based on the creditor's adequate remedy in the garnishment proceedings; for the fraudulent transfer is void at law as well as in equity, and, in the garnishment proceeding, the creditors may annul the covinous title.[16] But the decisions were not put on that ground. One more decision and the list is completed, and this seems to me the only unjustifiable decision in the whole category. In Bigelow v. Andress[17] the garnishing creditor filed a bill in chancery setting forth that the garnishee was disposing of the goods attached in his hands, and praying that he be enjoined from disposing of them, and that a receiver be appointed to take charge of the property. The bill was dismissed on demurrer on the ground that the garnishing creditor had no claim on or interest in the goods, but only the right to hold the garnishee personally liable for their value. The decision is indefensible from any point of view and stands entirely alone.[18] It has usually been held that the garnishee may be enjoined from disposing of the property, and obedience enforced by proceedings for contempt;[19] enjoined from taking it out of the State and ordered to pay it into court;[20] a receiver appointed to take charge of it if he abandons it;[21] and disposition of the property in disobedience of the garnishment summons has been treated and punished as contempt of the court's process, though no other order had been made.[22] The garnishing creditor, who has recovered judgment against the garnishee, may also quit his pursuit of the garnishee, and maintain an action in his own name for conversion against anyone, other than a purchaser for value without notice, who may have obtained the property and converted it to its own use.[23] He may also have a sale by a later levying creditor enjoined.[24] If this be a less lien than is acquired by a levy of an execution or attachment I fail to see wherein and should be pleased to be informed. So much space having been given to explaining *dicta* indicating that the garnishing creditor acquires no lien, no time will be taken to review those announcing a different rule; but this article cannot be better closed than by quoting a *dictum* which has the advantage of being sound law, and from a very respectable authority—Chief Justice Shaw of Massachusetts: "The trustee process,[25] provided for by statute, manifestly contemplates two distinct classes of cases, in which a creditor may avail himself of its provisions to secure his debt, by attaching property in the hands of a third person; the one, when the trustee has in his custody, or under his control, goods or chattels, liable by law to be attached on mesne process, by the ordinary writ of attachment; the other, where the trustee is a debtor to the principal defendant, and owes him money, either due and payable presently, or existing as a debt at the time of the attachment, though payable at a future day. Maine F. & M. Ins. Co. v. Weeks, 7 Mass. 438; Swett v. Brown, 5 Pick. 178. This distinction is founded on the statute rendering goods and credits, respectively, liable to attachment. In the former case the attachment binds the goods specifically, creates a lien upon them, of the same nature and to the same extent, as an ordinary attachment on mesne process, although the goods are to

[15] Wilson v. Harris (Hunt, J., dissenting), 21 Mont. 374, 54 Pac. Rep. 46; Childs v. Carlstein Co., 76 Fed. Rep. 86; Maish v. Bird, 48 Fed. Rep. 607.

[16] Custer v. Steever, 36 N. J. Law, 304; Kelley v. Andrews, 94 Iowa, 484, 62 N. W. Rep. 853; Lockland v. Garasche, 56 Mo. 267.

[17] 31 Ill. 322.

[18] In Iowa such an injunction was dissolved on proof that the garnishee was amply solvent. Sweet v. Oliver, 56 Iowa, 741, 10 N. W. Rep. 275.

[19] Mally v. Altman, 14 Wis. 22; Almy v. Platt, 16 Wis. 169; Bragg v. Gaynor, 85 Wis. 468, 55 N. W. Rep. 919.

[20] Johann v. Rufener, 32 Wis. 195; Germania Savings Bank v. Peuser, 40 La. Ann. 796, 5 South. Rep. 75.

[21] Northfield Knife Co. v. Sharpleigh, 24 Neb. 635, 39 N. W. Rep. 788.

[22] Lilienthal v. Wallach, 37 Fed. Rep. 241. But see Maxwell v. Bank of New Richmond, 101 Wis. 286, 77 N. W. Rep. 149.

[23] Focke v. Blum, 82 Tex. 436, 17 S. W. Rep. 770; Rockwood v. Varnum, 34 Mass. (17 Pick.) 289; Reed v. Fletcher, 24 Neb. 435, 39 N. W. Rep. 437.

[24] Erskine v. Staley, 38 Va. 12 Leigh. 406.

[25] This is the name for garnishment in Massachusetts.

stand charged, in the hands of the trustee, so that the custody remains with the trustee, instead of being taken by the attaching officer, unless a subsequent attachment is made by another creditor, which may be done, subject to the first attachment. Parker v. Kinsman, 8 Mass. 486; Burlingame v. Bell, 16 Mass. 318. But in both cases, the goods thus charged are deemed to be in the custody of the law, and they are made applicable to the purpose for which they are attached and held in the same manner; that is, by being advertised and sold by the officer on execution, and the proceeds applied to its satisfaction. The only difference is that, in the case of the trustee attachment, the goods having remained in the custody of the trustee must be by him exposed and delivered over to the officer holding the execution; whereas, in the case of an attachment by the ordinary process, the goods are in the custody of the officer, ready to be sold on the execution, when it comes into his hands for satisfaction. But under the other clause of the statute, rendering credits liable to be attached, the case is wholly different. It affects another species of property, and accomplishes its purposes in an entirely different mode. The great question then, the only question is, whether he owes the principal debtor anything; and if it appears that he does, he is held liable to pay it to his creditor's creditor, instead of paying it to the creditor himself."[26]

JOHN R. ROOD.

Ann Harbor, Mich.

[26] Allen v. Hall, 46 Mass. (5 Metc.) 263.

CONTRACT — IMPOSSIBILITY OF PERFORMANCE.

NORDYKE & MARMON CO. V. KEHLOR.

Supreme Court of Missouri, March 30, 1900.

1. Plaintiff and defendant, understanding that the K flouring mill produced 55 per cent. patent flour, made a contract by which the plaintiff agreed to erect a mill for defendant, for which he was to receive no compensation if its 60 per cent. product was not equal in quality to the 55 per cent. product of the K mill. The K mill did not make a 55 per cent. grade, and refused to change its machinery so as to do so. Held, that the contract was invalid, as the standard to which the mill was to conform had no existence, which made performance impossible.

2. In an action for the breach of a contract, which, by mutual mistake, is based on facts which do not exist, and there is no charge of fraud, it is immaterial which of the parties gave the information, with reference to which the contract was made, that such facts existed.

3. In an action for a breach of a contract, which, by mutual mistake, was based on facts which did not exist, the party pleading such facts cannot be rendered liable by reason of his negligence in not determining whether the facts existed.

4. Where a contract shows that it is based on certain facts which are shown to have no existence, a party thereto will not be allowed to show that he had knowledge that such facts did not exist.

5. Where a contract provides that a builder shall receive no compensation for the erection of a mill unless the product equal the best the K mill produces, as "now constructed and operated," the contract is based upon the present product of such mill, and not on what it is capable of producing.

VALLIANT, J.: Plaintiff is a corporation engaged in manufacturing flour mills, and defendant is an owner and operator of such mills. Plaintiff sued for the price of certain rolls furnished to defendant for his mills, and defendant answered with a counterclaim. The cause was by consent referred to Arba N. Crane, Esq., to try all the issues. Upon the trial before the referee the plaintiff's cause of action was confessed, but the controversy was over the counterclaim, which controversy is sufficiently stated in the report of the referee, as follows: "Shortly stated, the case is that by its contract plaintiff agreed to furnish a flouring mill, of a specified description, to be paid for when completed and proved capable of producing flour of a certain percentage. Before anything considerable was done towards performing the contract, the plaintiff abandoned it, on the express ground that the contract was inoperative, because the basis furnished by it for said percentage test was impossible. Later on the defendant obtained from Allis & Co., of Milwaukee, a flouring mill, located on the same site. The contract in question was entered into and dated May 28, 1892, between the plaintiff, as party of the first part, and the defendant and one E. E. Pierson, parties of the second part. Pierson was a miller residing in Lawrence, Kan., and operating a flouring mill in that State. Before this suit was begun he assigned his interest in the contract to defendant, Kehlor, whom I will hereafter refer to as the contracting party." Then, continuing, the report sets out the contract in *hæc verba*, which, without here copying, it is sufficient to say it is to the effect that plaintiff agreed to furnish, within a certain period, all materials, machinery, etc., and erect, "in as proper order as is known to science in the art of milling at the present time, and to deliver to them, a flouring mill, with an easy capacity of manufacturing fifteen hundred barrels of flour, of all grades, as specified hereinafter, combined, in every day of twenty-four hours run," according to specifications, etc. The contract concludes as follows: "The meaning and intent of the above agreement is as follows: The party of the first part having

agreed to build a flouring mill according to the specifications," etc., "furnished by them, and which is guarantied by them to be as complete and perfect a flouring mill, as far as construction, durability, and easy working is concerned, as any in the United States, and to make at least the lowest percentage of flour mentioned hereafter as conditions of payment. * * * And, in consideration of the above, party of the second part agrees to pay for the same, when the mill is completed and proved capable of producing not less than sixty per cent. of Kansas hard wheat flour, fully equal in quality to the best fifty five per cent. that Kelly & Lysle can make in their mill at Leavenworth, Kansas, as now constructed and operated, from the same quality of wheat, and the same yield, which shall not exceed four and one-half bushels to the barrel of flour, the remaining forty per cent. to be fully equal to Kelly & Lysle's remaining forty-five per cent. in proportion according to grades contained in Kelley & Lysle's remaining forty-five per cent., sixty-five thousand dollars, as follows: $15,000 to be advanced when the machinery is ready for shipment; $17,500 to be advanced during the construction of the plant and as it progresses; $32,500 to be paid upon completion of the plant by the first party, as provided above." (Then follow promises to pay $75,000 if the mill produces 75 per cent. equal to Kelly & Lylse's best 55 per cent., and to pay $85,000 if it produces 90 per cent. equal Kelly & Lysle's best 55 per cent. of flour.) Further the report says: "In his counterclaim the defendant states his view of the terms of the contract, and says that his motive in making it was his obligation to others to build a flouring mill at Shawnee on land acquired for that purpose. He also alleges his own readiness always to perform his part of the contract, and says that on the 5th day of July, 1892, the plaintiff definitely refused to perform, and never has performed, its part of the contract. He alleges that the market value of the mill, constructed and completed as agreed, and conforming to the contract and guaranty, would have been $150,000; that, after the plaintiff had refused to perform its contract, defendant tried to get a mill constructed of the same description, but was unable to do so, because the plaintiff alone was able to construct the mill on the plan called for by the contract. He lays his damages at $85,000. The reply of the plaintiff contains a general denial of all the allegations in the counterclaim, except such as are specially admitted by said reply. * * * In justification of the refusal of plaintiff to perform the contract, it is, in substance, alleged in the reply that the contract was vitiated by a mistake in basing the flour percentage test on a 55 per cent. of Kelly & Lysle's manufacture, the fact being that Kelly & Lysle never made and could not make flour of that percentage without first making changes in their mill, which, when solicited to do by the parties to this contract, they refused; that this test was put in the contract by the defendant, who wanted to make a better flour than Kelly & Lysle; that plaintiff had no knowledge as to the grades of the Kelly & Lysle flour, but was informed by defendant and by Pierson that it was 55 per cent. best grade, and this the plaintiff believed, or it would not have entered into the contract. When the mistake was discovered and it was found that Kelly & Lysle would not change their mill so as to run a 55 per cent. grade, plaintiff asked the defendant to modify the contract in this particular of the percentage test, which defendant refused; whereupon plaintiff declined to go on with the contract. The reply also states that defendant obtained a mill of the like kind, character, and quality with that which plaintiff contracted to build, and that said mill has been erected and is now in operation on the land mentioned in defendant's answer, and is capable of producing not less than 1,500 barrels of flour in each 24 hours of continuous run. * * * Proceeding now with the inquiry in hand, there is no doubt that an error was made in designating in the contract the Kelly & Lysle product as a 55 per cent. grade of flour, and it is proper to notice how this error happened to occur." Then follows, in the report, a summary of the evidence on that point, and the evidence to show that Kelly and Lysle had not made and declined to make that percentage of flour. Then the referee says: "Under the date of July 1, 1892, the plaintiff wrote to the defendant that, inasmuch as Kelly & Lysle made no 55 per cent. flour, the percentage test should be changed, and suggesting a 70 per cent. grade of Kelly & Lysle's manufacture as the standard of comparison. To this proposition defendant replied by letter to plaintiff under date of July 2, 1892, declining to make any change in the percentages. In answer to the latter letter, the plaintiff wrote to the defendant, under date of July 5, 1892, stating its views of the importance of the percentage test, and saying that, 'as you have refused to make any changes in this portion of the contract that would place us in as fair a position as we supposed we were when the contract was signed, we are forced to decline to proceed further with the contract.' From the evidence, thus briefly summarized, I find that the selection of a 55 per cent. grade of flour of Kelly & Lysle, as the basis for the test of the mill contracted for, was made on information originating with Pierson, and communicated by him to the plaintiff, and that this standard of comparison was insisted upon by the defendant, and was inserted by him in the contract, but was honestly believed by both parties to exist when the contract was signed; that in this belief both parties were in error, and in agreeing and contracting for the percentage test they acted under a mutual mistake of fact. This brings me to the consideration of the question whether the mistake under which the parties acted was fatal to the contract. Recurring to the testimony, it will be recollected that throughout the negotiations the idea prom-

inent with the defendant was to obtain a mill that would compete with that of Kelly & Lysle. The mill to be built for him must make as good or better flour than Kelly & Lysle were making. I think it no exaggeration to say that this qualification or attribute of the mill to be built was a *sine qua non* with the defendant. It is therefore evident that, to give effect to this purpose, a standard of comparison of the product of the completed mill with the flour made by Kelly and Lysle was indispensable, and it would seem to follow that, if the provisions of the contract are adequate to effect the purpose mentioned, they are material and essential provisions." Quoting again that paragraph in the contract hereinabove quoted, in regard to the conditions precedent to payment by defendant, the report continues: "In similar language provision is made for increased pay for the attainment of greater percentages. These provisions are adequate, and, I think, more than adequate, to effect the purpose which the negotiations show that the defendant desired to accomplish; for they not only contain the guaranty of the plaintiff, but they make the defendant's promise to pay for the mill dependent upon the fulfillment by plaintiff of the percentage test, based on 55 per cent. product of Kelly & Lysle. Consequently, when it was found that the test could not be made, the obligation of the defendant to pay for the mill terminated, and, inasmuch as the contract to build and the contract to pay for the mill were concurrent considerations, no contract remained that a court could enforce. It seems to me that this consequence clearly shows the importance of this percentage test in the contract and my belief is that without this test the contract would not have been made." The conclusion of the referee was that the plaintiff was justified in abandoning the contract, and should have judgment on the counterclaim. The report was reviewed by the circuit court on exceptions filed, which exceptions were overruled, and the judgment followed accordingly, from which the defendant in due course has prosecuted this appeal.

The report summarizes the evidence on the question of the amount of defendant's damages in case he is entitled to recover, and gives the referee's conclusion thereupon, but the view that we take of the contract in question renders it unnecessary to review that part of the report. This is an action at law. The plaintiff's reply to the defendant's counterclaim does not seek, as in equity, a rescission or reformation of the alleged contract, but pleads at law that the contract on which the counterclaim is based was in effect no contract; that its own provisions defeated itself; that, in aiming to stipulate a degree of excellence and efficiency which the mill when completed should possess, a standard which it was assumed existed was chosen, by which alone the degree of excellence and efficiency intended to be contracted for was to be tested and proven, and the plaintiff's right to recover the contract price demonstrated, but that after the contract was signed it was discovered that the assumed standard had never existed, and could not be obtained; therefore the plaintiff in its plea said the contract was meaningless, and its performance, by its own terms, rendered impossible. It is not charged in the pleadings that fraud was perpetrated, or there was any wilful misrepresentation or concealment of a fact, by either party, but there was considerable evidence to show who was responsible for the mistake in assuming that the best grade of the output of the Kelly & Lysle mills was a 55 percentage, and upon that point the referee found (and the evidence was sufficient to support the finding) that Mr. Pierson furnished the information upon which the contracting parties acted, and they all supposed it was true. But in the trial of this issue at law, uninfluenced by any charge of fraud, it is immaterial who gave the information. The contract, speaking for itself, shows that it was assumed as a fact, and adopted as the standard by which alone the plaintiff 'could prove that it had performed its contract and earned the price agreed on.

It is contended in behalf of the defendant that the plaintiff was negligent in not informing itself on this point, as it might have done, before entering into the contract. That would be a good answer to the plaintiff's plea if the contract was susceptible of performance, and its performance, when complete, was susceptible of demonstration, in the absence of the fact assumed, and if the plaintiff were seeking in equity a rescission of the contract on the ground of mutual mistake, which was the case in Brown v. Fagan, 71 Mo. 563, to which appellant refers. But the plaintiff is not seeking equitable relief against a contract susceptible of performance according to its terms, but its contention is that the alleged contract was attempted to be built upon a foundation which did not in fact exist, and therefore the attempt failed.

To appreciate the meaning of the test adopted, we must bear in mind what millers mean by the terms employed in this contract on that point. It seems that every flouring mill separates its product into two or more grades. Into the first grade it puts its best quality, which is called its "patent flour," and is the best product obtained by that mill from wheat handled by it. What is left of that wheat goes into inferior grades of flour. The skill of the miller is directed to getting the largest percentage, compatible with desired excellence, of patent flour out of a given quantity of wheat. All patent flour in the market is not of the same quality. The quality may be influenced by the percentage of the product the miller sees fit to set apart for that grade. Therefore, if a mill puts only 50 per cent. of its product into its patent flour, that flour would be a better quality than if, using the same skill and machinery, the

miller put 70 per cent. of the product into it. So that when it was stipulated in this contract that the mill to be constructed by plaintiff should be capable of producing 60 per cent. of patent flour equal in quality to that of 55 per cent. produced by the Kelly & Lysle mills, and that it should be so proved, as a condition to the plaintiff's right to receive the contract price, it is manifest that the parties considered that a very material and essential element in their undertaking. And if their assumption was well founded, if the Kelly & Lysle mills were producing 55 per cent. flour, and plaintiff had performed its contract by producing a mill of the standard degree of excellence stipulated, that fact was susceptible of demonstration in the manner agreed upon. But when it turned out that their assumption was unfounded, they were in the attitude of having contracted with reference to something that did not exist. We cannot conceive that the plaintiff intended to agree to furnish the mill, and have his right to recover the contract price depending on an impossible test, nor can we conceive that the defendant in good faith accepted such an obligation. They were both mistaken, and the contract which they intended to establish on that foundation falls when the foundation itself is discovered to have no existence. And in such case it is immaterial that the party pleading the mutual mistake was negligent in seeking information. Koontz v. Bank, 51 Mo. 275; Bank v. Allen, 59 Mo. 313; Griffith v. Townley, 69 Mo. 13; Mathews v. City of Kansas, 80 Mo. 235; Pol. Cont. 412; Bank v. Eltinge, 40 N. Y. 391.

The learned counsel for the appellant quotes from the Supreme Court of the United States: "The principle deducible from the authorities is that, if what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail the defendant. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse non-performance." The Harriman, 9 Wall. 172, 19 L. Ed. 633. And other authorities are cited in support of the same general principle therein announced, the correctness of which is not questioned.

But was this contract possible of execution? If the Kelly & Lysle mills were producing 55 per cent. patent flour, it would be no excuse to the plaintiff, if, when it had exhausted its utmost skill, it found it had failed to make a mill that would produce a 60 per cent. patent flour equal in quality to the Kelly & Lysle 55 per cent. product, because in such case the law will not recognize that the limit in scientific attainment has been reached, and, although the achievement promised may be beyond anything that had before been done, yet if the plaintiff saw fit to undertake it, and condition its pay on its fulfillment of the promises, the law will give him no relief against his undertaking. But where he contracts to furnish a mill that will produce a result measured by a stated standard assumed to exist, when in fact no such standard did exist, the contract is impossible of fulfillment. If the defendant, in anticipation of the completion of his mill with a capacity as to quantity and quality to the stipulated test, had contracted to sell 1,000 barrels of flour equal in quality to the 55 per cent. product of the Kelly & Lysle mill, and having, when the time came, tendered that quantity of flour as in fulfillment of his contract, and the purchaser refused it on the ground that it was not of the quality desired, how could the defendant, in a suit to recover for a breach of the contract, prove that the flour tendered was of the quality contracted for? There would be the same inherent infirmity in such contract that there is in the contract now in suit. It is an attempted contract, assuming the existence of an essential fact which does not exist, and therefore there has been no meeting of the minds in reality and no contract. Gardner v. Lane, 9 Allen, 492.

It was contended that there was no mutual mistake in this matter; that if there was a mistake it was the mistake of the plaintiff alone. But the contract itself speaks upon that point, and speaks for both parties. It assumes that the fact existed, and bases the contract on that assumption. Neither party could show by evidence *aliunde* that he knew that Kelly & Lysle were not making and could not make with their mill, as then "constructed and operated," 55 per cent. patent flour, without bringing his good faith into question. There is some discussion in the briefs over the term "can make" in reference to the quality of flour to be produced by the Kelly & Lysle mills, the plaintiff's guaranty as to efficiency being that the mill to be furnished will produce 65 per cent. flour "equal to the best 55 per cent. that Kelly and Lysle can make in their mill * * * as now constructed and operated." It is contended that those words do not indicate that Kelly & Lysle were making 55 per cent. flour, but only an assurance that the mill to be furnished would do better than the rival mill could do. The contract might have been so worded as to have made a possible test of the two mills as a collateral fact carrying a forfeiture or reward, leaving the contract in its main features capable of being performed and of being enforced both as to the mill to be furnished and the payments to be made, irrespective of the test, and in that event the failure to obtain the means of making the comparative test would affect only the collateral feature. But in this case the plaintiff, after completing the mill, could not recover the contract price until it had proved the capacity of its mill by that test, so this condition goes to the vitals of the contract itself. It is said in the evidence that the contract was written by defendant, and its wording is his choosing. Not much importance should be given to that fact in an issue of this kind (though in the trial of some issues that would be a material consideration), because when the contract is made it becomes the act of both parties. But the circumstances under which it was made and the object

in view should be considered in giving meaning to doubtful terms. The Kelly & Lysle mills were at the time in operation at Leavenworth, Kan., and the defendant's mill was to be located in Wyandotte county, in that State. The object of the clause in the contract now under discussion was to obligate the plaintiff to build a better mill for defendant than that of Kelly & Lysle, one that would produce a patent flour of higher percentage of equal quality, and the clause binds the plaintiff to accomplish that; and, as a condition precedent to its right to payment, can it be supposed that the plaintiff in its right senses, or the defendant in good faith, were indifferent to the fact as to the per cent. of flour the rival mills were actually producing, and rested their test upon a mere chance? Good sense and good faith both repel that suggestion.

Appellant contends that when it became known that Kelly & Lysle had never made, and refused to make, 55 per cent. patent flour, so that the test contemplated could not be attained, it was the duty of plaintiff to have proceeded with its part of the contract, and to have trusted to recover a *quantum meruit* for its compensation. Plaintiff was under no such obligation. It had not contracted to build for defendant "as complete and perfect a flouring mill, as far as construction, durability, and easy working is concerned, as any in the United States," of the capacity of 1,500 barrels a day, and receive in payment therefor what a jury might say the time, labor, and materials were reasonably worth, but had agreed to do so for a certain price. It was bound by its contract, or not bound at all, and was entitled upon a fulfillment of the same on its part to the contract price. True, if it had completed the work, and defendant had accepted it, plaintiff, in a count on *quantum meruit*, could have recovered its value within the contract price. But this is a suit on a contract, and the rights of the parties are to be determined by the contract alone. This contract was so guardedly framed that the plaintiff could not by its terms receive as pay anything at all until it had proven, by the test specified, that the mill had the promised capacity. Defendant agreed to advance certain sums at stated events, but not to make payments.

There is another feature of this contract that is not to be overlooked in this connection. The $65,000 to be paid for the mill, when brought up to the first test specified, was not the only consideration which induced the plaintiff to enter into the contract; but if a certain higher degree of excellence and efficiency were attained, measured also by the 55 per cent. output of the Kelly & Lysle mill, the contract price was to be $75,000 or $85,000. Now, suppose when Kelly & Lysle refused to alter their mill to make the percentage flour required for the test, and when defendant refused to modify the contract as to that test, plaintiff had proceeded and built a mill in all respects as called for in the specifications, how could it, by any form of suit, have recovered the price of this higher excellence which the contract promised? No count on *quantum meruit* would avail. When labor and materials are furnished by request, and no price is agreed on, the law will imply an agreement to pay what it is reasonably worth. But men are not restricted to that valuation in making their contracts, and particularly in the arts and sciences men often contract for a higher price, in view of the skill and learning expected, than the ordinary market value of such commodities. When men contract for such prices, the law does not require them to be content with a jury's valuation. We are not now dealing with an implied contract. These parties intended to make a contract very specific in all its terms, both as to the mill to be manufactured and the price therefor to be paid. The specifications were elaborate, covering every point of construction, but the defendant was not satisfied to have the mill to be judged when finished by an examination of itself, but required it to be tested by its product, and required the plaintiff to prove by that test that it was a better mill than that of Kelly & Lysle. Until so proven, the plaintiff's work was not up to the required standard, and defendant was bound to pay nothing, and all this testing would have been perfectly feasible if the fact had been, as they supposed it to be, that Kelly & Lysle made 55 per cent. patent flour. But, as that was not the fact, the contract which the parties attempted to make, believing that it was a fact, became impossible of performance in a very material part, and wholly failed of its purpose. This is the view of the case taken by the circuit court, and its judgment is affirmed. All concur, except Robinson, J., absent.

NOTE.—*Recent Decisions on the Effect of Impossibility of Performance of Contract.*—One who contracts to build a house, the last installment of the cost to be paid him "on completion of the work," cannot claim such installment if the house was destroyed by fire before the second coat of paint was on the house, all the doors hung, the fastenings put on the front doors and windows, or the building delivered to the owner. Clark v. Collier, 100 Cal. 256, 34 Pac. Rep. 677. Where defendant agrees to furnish cargo for plaintiff's boat, and to load it three days after it is in the dock, he is not excused from performance because plaintiff did not keep the boat at the dock for three days, in consequence of the dock master ordering the boat to give place to other boats that were ready to load, as it would be presumed the contract was made with reference to the dock regulations. Hassett v. McArdle (Com. Pl. N. Y.), 28 N. Y. S. 48, 7 Misc. Rep. 710. Defendant agreed to refund to plaintiff, on his surrender to defendant of his shares or interest in a certain company, at the end of two years from date of the agreement, the amount paid by plaintiff for 10 shares of stock in such company. Held that, if plaintiff voluntarily surrendered to the company the shares of stock in consideration of its issue to him of new stock, he could not recover on the agreement, as he had incapacitated himself to perform his part thereof, though defendant was a director of the company, had knowledge of the surrender of the stock, and was active in consummating it. Kolsky v. Enslen (Ala.), 15 South. Rep. 558. Where one employed to teach in

a public school for a certain time is able and willing to teach during that time, the fact that the school was necessarily closed part of the time by order of the board of health, because of the prevalence of a contagious disease among the pupils, does not deprive the teacher of the right to compensation for the entire time, since such closing of the schools is not caused by the act of God. Gear v. Gray (Ind. App.), 37 N. E. Rep. 1059. Where plaintiff, in an action for breach of contract, must show performance on his part before he can recover, non performance by him cannot be excused on the ground that it was caused by the act of God; and Civil Code, § 1511, providing that want of performance is excused "when it is prevented or delayed by irresistible superhuman cause," does not apply to such cases. Remy v. Olds (Cal.), 34 Pac. Rep. 216. Plaintiff owned timber lands on one river, and a sawmill on another. Defendant logging company contracted to receive the logs, and deliver them at plaintiff's mill. To do this it was necessary to drive them down the first river into a boom where they were formed into rafts so as to be towed up the other. The contract bound defendant to perform these operations, and specified "Beef slough" boom, which was controlled by defendant, as the one into which the logs were to be driven. Beef slough became filled up by the action of floods, but defendant constructed a boom in another slough, and the operations necessary to the delivery of plaintiff's logs could be carried on as well at this boom as at Beef slough. Held, that defendant could not excuse itself from further performance of the contract on the ground that it had been rendered impossible by natural causes which it could not control. Robson v. Mississippi River Logging Co. (C. C.), 61 Fed. Rep. 893. Plaintiff agreed with defendant city to alter and extend an existing market building according to certain plans within 9 months, in consideration of a lease of the building as altered for 25 years. The contract provided that, if plaintiff failed for any cause to perform the work within the time fixed, plaintiff would be deemed to have waived his rights under the contract without notice. Held, that plaintiff, having failed to extend the building as agreed, could not restrain defendant from interfering with his possession of the building, as the building to which the lease was to attach was not in existence. St. Mary's Wholesale Fruit & Vegetable Market Co.v. City of New Orleans (La.),16 South. Rep. 831, 47 La. Ann. 205. In the case of an ordinary memorandum of association, according to which the capital is divided into shares of equal amount, the interests of the shareholders are equal in all respects. Where, therefore, in consideration of the assignment of a lease, A agreed to pay B £1,000 within 12 months, or otherwise transfer to B the like amount in fully paid-up shares in a company to be formed by A, with preferred and deferred shares, held, that B was entitled to receive shares, the interest in which was equal in all respects to those held by other shareholders; that A, by forming the company with two unequal classes of shares, had put it out of his power to comply with the one alternative of the contract; and that, therefore, he was bound to perform the other alternative, viz., to pay £1,000. McIlquham v. Taylor, 8 Reports, 740. The fact that the performance of a contract to furnish the government with Montana upland hay is rendered impossible by failure of the crop through natural causes relieves the contractor of the duty to perform. Browne v. United States, 30 Ct. Cl. 124. A contract to take control of logs, and drive them to a certain boom, was not discharged by a flood which changed the river banks, and made it necessary to abandon the boom named, and to construct another. Mississippi River Logging Co. v. Robson, 16 C. C. A. 400, 69 Fed. Rep. 773. The breaking of machinery is not a providential hindrance, within the meaning of a contract to do certain work unless providentially hindered. Day v. Jeffords (Ga.), 29 S. E. Rep. 591. Where the execution of a contract has been rendered impossible in its entirety by reason of a fortuitous event not preceded by some fault of the debtor, the creditor cannot exact damages for non execution. Romero v. Newman, 50 La. Ann. 80, 23 South. Rep. 493. Where performance is prevented by the act of God, no breach can be assigned, although no reference thereto was made in the contract. Gleason v. United States, 33 Ct. Cl. 65. In an action on a logging contract, a charge that if defendant wantonly, or carelessly and negligently, hindered or prevented plaintiffs in endeavoring to perform, to such an extent as to render peformance difficult and greatly decrease profits plaintiffs would have otherwise made, such interference justified plaintiffs in abandoning the contract, and entitled them to recover damages actually sustained, was correct. Wager Lumber Co. v. Sullivan Logging Co. (Ala.), 24 South. Rep. 949. It is no defense to a subcontractor's failure to bind walls with iron trusses immediately after their completion as agreed, because of which the walls were blown down, that the contractor failed to remove the staging he had used in erecting the same, which was not objected to. Meyer v. Haven, 55 N. Y. S. 864, 37 App. Div. 194. See article 12 Cent. L. J. 4, on "Impossibility of Performance of Contract."

BOOK REVIEWS.

AMERICAN BANKRUPTCY REPORTS, VOL. 3.

It is about three months since volume 2 of these reports was issued. These reports will be found very useful to lawyers who have cases in bankruptcy; they contain all decisions rendered by federal judges, by referees in bankruptcy and by State courts. William Miller Collier, author of Collier on Bankruptcy, and James W. Eaton, instructor on the law of bankruptcy in the Albany law school, are the editors. Most of the cases reported are accompanied by exhaustive annotations. The publishers announce that each subscriber will receive advance sheets of the various decisions in pamphlet form of all that will thereafter be contained in the bound volumes. Over 200 cases are reported in volume 3. It also contains a table of sections of the bankrupt act of 1898, and of the general orders of the supreme court construed in, or considered in or affected by, the decisions reported in this volume. About 1,400 citations appear in the table of cases. One of the most useful features in this volume is the index which contains in effect digests of the cases reported. It is difficult to see how lawyers who practice in bankruptcy proceedings can do without these reports. Volumes 1 and 2 reported the cases to January 1, 1900. Volume 3 begins with cases decided from and after January 1, 1900. This volume contains 950 pages, printed on very heavy paper, bound in law sheep, 8vo. For sale by Central Law Journal Company. St. Louis.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published

in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

ALABAMA.....80
ARKANSAS.....4, 6, 55
CALIFORNA.....7, 29, 46, 68, 70
ILLINOIS.....18, 19, 26, 41
INDIANA.....9, 34
KENTUCKY....10, 11, 15, 17, 51, 63, 71, 73, 76, 84, 85, 90, 94, 96
MISSISSIPPI.....1, 8, 36, 38, 61, 65, 69, 72, 77
MONTANA.....74
NEW HAMPSHIRE.....80
NEW YORK.....23, 25, 32, 33, 40, 57, 60
OHIO.....14, 20, 42, 58, 64, 67
PENNSYLVANIA.....13, 22, 66, 75, 95
TEXAS.....12, 35, 54, 62, 83, 89, 91
UNITED STATES C. C.....24, 27, 47, 88, 97
UNITED STATES C. C. OF APP.....50
UNITED STATES D. C.....49
UNITED STATES S. C.....2, 21, 28, 48, 78, 81
WEST VIRGINIA, 3, 5, 16, 31, 37, 39, 43, 44, 45, 52, 53, 56, 59, 79, 82, 86, 87, 92, 93

1. ADMINISTRATION—Real Estate—Sale.—An order directing an executor to sell lands as directed by the will, and that the remainder be distributed after payment of costs and solicitor's fee, in accordance with the interests of defendants as shown in the executor's petition for the sale, is an interlocutory order, and does not warrant distribution of the proceeds of the sale.—BEEKS v. RYE, Miss., 27 South. Rep. 635.

2. APPEAL—Amount in Controversy.—The value of land, and not simply the value of the right of present possession thereof, is the amount in controversy for the purpose of an appeal to the Supreme Court of the United States from the supreme court of a territory, when the case involves a claim of right to land of which the naked legal title remains in the United States.—BLACK v. JACKSON, U. S. S. C., 20 Sup. Ct. Rep. 648.

3. APPEAL—Jurisdiction—Amount in Controversy.—In determining the question of jurisdiction in an action for the recovery of money on contract, which comes to this court on appeal to the circuit court, and writ of error, the amount claimed in the summons must determine the question of jurisdiction.—CASE MFG. CO. v. SWEENY, W. Va., 35 S. E. Rep. 853.

4. ASSIGNMENTS FOR BENEFIT OF CREDITORS—Validity—Preferences.—Where defendant's husband failed in business, and she continued the same, with her husband as manager, for 10 years, and he borrowed money on notes which she indorsed as surety, the proceeds of which he loaned to defendant for use in the business, defendant, on making a voluntary assignment of all her property for the benefit of creditors, was entitled to prefer her husband's claim for such money.—PHELPS v. WYLER, Ark., 56 S. W. Rep. 632.

5. ASSIGNMENT FOR CREDITORS—Liabilities.—An assignee for the benefit of creditors ought not to be made personally liable for the notes, bonds, and accounts assigned when they become due, but only at the time when actually collected by him, except such notes, bonds, and accounts as are lost by his negligence or improper conduct.—RUHL v. BERRY, W. Va., 35 S. E. Rep. 896.

6. ATTACHMENT—Absent Debtor—Exemption.—Where property of a debtor, who is the head of a family, is attached on the ground that he has concealed himself so that summons cannot be served, and the property is exempt, the exemption can be claimed in his absence by his minor children, acting by their grandfather, as next friend; the presumption being that defendant had not abandoned the premises, and that he had left the grandfather in charge.—WHITE v. SWANN, Ark., 56 S. W. Rep. 635.

7. ATTORNEY AND CLIENT—Notice to Attorney.—Notice to an attorney before employment by a client is not notice to such client.—CHAPMAN v. HUGHES, Cal., 60 Pac. Rep. 974.

8. BENEFICIAL ASSOCIATIONS—Forfeiture—Non-Payment of Assessments.—Under by-laws of a beneficial association providing that members in arrears for dues shall be declared "non-financial," and shall not receive any benefits, a member in arrears for dues is not "non-financial" unless so declared by the local lodge, and hence is entitled to benefits.—MURPHY v. INDEPENDENT ORDER OF SONS & DAUGHTERS OF JACOB OF AMERICA, Miss., 27 South. Rep. 624.

9. BENEFICIAL ASSOCIATIONS—Sick Benefits—Conditions.—A policy provided that, if a member should become wholly disabled from prosecuting any kind of business by reason of sickness, he should receive a weekly indemnity "during the time he was confined to the house and under a physician's care." Held, that a member who was wholly disabled from prosecuting his business on account of sickness did not violate the conditions on whichhe was to receive indemnity by going out of the house, under the advice and directions of a competent physician, for the purpose of taking exercise and receiving medical treatment at the physician's office.—COLUMBIAN RELIEF FUND ASSN. v. GROSS, Ind., 57 N. E. Rep. 145.

10. BILLS AND NOTES—Addition of Name Before Delivery.—The addition of a name to a note before its delivery does not release those previously signing, though done without their knowledge.—EVANS v. PARTIN, Ky., 56 S. W. Rep. 648.

11. BILLS AND NOTES—Evidence—Warehousemen.—As B, the president of plaintiff corporation, accepted from defendant an order for the net proceeds of tobacco belonging to defendant in the hands of a warehouse company of which B was vice-president, it was B's duty to collect the proceeds, less defendant's indebtedness to the warehouse company, and credit them on the note sued on; and therefore an account of sales of the tobacco which was sent to defendant by plaintiff was admissible in evidence for defendant, as was also testimony as to the amount of the debt due by defendant to the warehouse company.—HOLMES v. BROOKS-WATERFIELD CO., Ky., 56 S. W. Rep. 661.

12. BILLS AND NOTES—Wrongful Delivery.—Defendant pleaded that he was a surety only on a note sued on; that the maker agreed to procure another solvent surety, of which plaintiff had notice before delivery; and that the maker wrongfully delivered the note with the additional signature of G, who was insolvent. Held, that the violation of such agreement constituted a good defense, since under it the delivery of the note was without defendant's authority.—LARGE v. PARKER, Tex., 56 S. W. Rep. 587.

13. BOND—Sealed Instrument—Consideration.—A seal imports a consideration, and creates a liability; and want of consideration is no defense to an action on a bond or note under seal.—COSGROVE v. CUMMINGS, Penn., 46 Atl. Rep. 69.

14. BOND AND INVESTMENT COMPANIES—Deposit.—Corporations which, in consideration of stipulated installments of money paid to and to be paid, deliver to the payor a bond entitling him, upon conditions named, to receive an article of value, and requiring the payor to contribute to the payment of the expenses of the corporation, are subject to the provisions of the act "to regulate certificate, bond, and investment companies," etc., passed April 25th, 1898 (93 Ohio Laws, p. 401).—STATE v. TONTINE SURETY CO., Ohio, 57 N. E. Rep. 60.

15. BUILDING AND LOAN ASSOCIATIONS—Usury.—In an action by a borrowing member against a building and loan association to recover usury paid, it was error to submit to a jury the question of the intention of the parties, as the member is a borrower and the associa-

tion a lender of money, regardless of the intention; but, as the error did not induce an erroneous verdict, it was harmless.—PIONEER BUILDING & LOAN ASSN. v. JONES, Ky., 56 S. W. Rep. 657.

16. CARRIERS—Passenger—Assault by Conductor.—A railroad company is liable to a passenger on one of its trains for a willful assault and battery committed on such passenger by the conductor in charge of such train. Such an assault is a breach of the duty of protection which said company owes to its passengers.—SMITH v. NORFOLK & W. RY. CO., W. Va., 35 S. E. Rep. 834.

17. CARRIERS OF PASSENGERS—Servants Riding Home From Place of Labor.—One who rides on a passenger train, by courtesy of the conductor, without payment of fare, though in violation of a rule of the company, is entitled to the same care which is due to a passenger for hire.—LOUISVILLE & N. R. CO. v. SCOTT'S ADMR., Ky., 56 S. W. Rep. 674.

18. CHATTEL MORTGAGE—Recital as to Security.—Under Laws 1895, p. 260, requiring that "all notes secured by chattel mortgage shall state upon their face that they are so secured," a chattel mortgage is not void in the hands of the mortgagee, as against an execution creditor of the mortgagor, because of the recital in the note, simply, that it is "secured by mortgage."—SELLERS v. THOMAS, Ill., 57 N. E. Rep. 10.

19. CONSTITUTIONAL LAW—Advertising Business—Use of Flag.—The constitutional right of every citizen to choose his occupation includes the right to advertise it in a legitimate way, and Act April 22, 1899, prohibiting the use of the national flag for such purpose, unduly interferes with personal liberty, unless thereby the public health, safety, welfare, or comfort is conserved.—RUHSTRAT v. PEOPLE, Ill., 57 N. E. Rep. 41.

20. CONSTITUTIONAL LAW—Pure Food Laws.—The police power of the State is properly exercised in the prevention of deception in the sale of dairy products, and in the protection of the health of the people; and it is within the scope of this power to regulate the manufacture and sale of articles of food, even though the right to manufacture and sell such articles is a natural right guarantied by the constitution.—STATE v. CAPITAL CITY DAIRY CO., Ohio, 57 N. E. Rep. 62.

21. CONSTITUTIONAL LAW—Sunday Labor—Barbers.—The *proviso* that keeping a barber shop open on Sunday for the purpose of cutting hair and shaving beards shall not be deemed a work of necessity or charity, which follows the exception as to works of necessity or charity, in Minn. Gen. Stat. 1894, § 6513, prohibiting Sunday labor, does not make a purely arbitrary classification in conflict with the federal constitution, but is within the limits of the legislative police power.—PETIT v. STATE OF MINNESOTA, U. S. S. C., 20 Sup. Ct. Rep. 666.

22. CONTRACTS—Construction—Authority of Agent.—A building contractor, under a contract which provided that any errors in the plan should be referred to the architect before the work was proceeded with, cannot justify a rescission of a contract on the ground that there were errors in the plans, which made it impossible to erect the building according to the plans, where he did not call the architect's attention to the defects, and ask for a correction.—GIBBS v. SCHOOL DIST. OF BOROUGH OF GIRARDVILLE, Penn., 46 Atl. Rep. 91.

23. CONTRACT TO FURNISH LUMBER—Measure of Damages.—In an action on a note given for lumber, where defendant pleads a counterclaim for damages from plaintiff's failure to deliver all the lumber due, plaintiff cannot testify, as evidence of its market value, that, after his refusal to deliver the lumber, he resold it at the same price, as, the rule of damages for such breach being the difference between the contract price and its market value, the testimony was a self-serving act, influencing a jury to conclude that defendants had suffered no damage by the breach.—LATIMER v. BURROWS, N. Y., 57 N. E. Rep. 95.

24. CORPORATIONS—Carrying on Business.—A single contract made by a corporation owning mining ground in a territory, by which it employs and agrees to pay a second party to exploit and develop the property, does not constitute a carrying on of business in the territory by the corporation, within the meaning of a statute requiring foreign corporations carrying on business within the territory to file copies of their articles of incorporation, and providing that every act done by them prior to the filing thereof shall be void; and such statute does not affect the validity of the contract.—EMPIRE MILLING & MINING CO. v. TOMBSTONE MILL & MINING CO., U. S. C. C., D. (Conn.), 100 Fed. Rep. 910.

25. CORPORATIONS—Contracts—Power of Officers.—A by law of a corporation, adopted by the board of trustees, whose terms of office continued only four years, authorizing the president and actuary of the company to appoint, remove, and fix the compensation of each and every person employed by the company, does not authorize a contract by the president and actuary in behalf of the corporation employing a person for life.—CARNEY v. NEW YORK LIFE INS. CO., N. Y., 57 N. E. Rep. 78.

26. CORPORATIONS—Estoppel—Appeal Bond.—A corporation having authority only to manufacture and sell ale, beer, and porter, and to carry on a general brewing business, cannot be held liable upon its undertaking as surety on an appeal bond, although the inducements to its execution of the bond were to enable the principal to continue in the business of selling beer, and to make further purchases of the corporation.—BEST BREWING CO. OF CHICAGO v. KLASSEN, Ill., 57 N. E. Rep. 20.

27. CORPORATIONS—Foreign Corporations—Jurisdiction.—Legal service of process upon a corporation, which will give a court jurisdiction over the corporation, can be made only in the State where it resides by the law of its creation, or in a State in which it is actually doing business at the time of the service, and from that circumstance derives a residence.—SWANN v. MUTUAL RESERVE FUND LIFE ASSN., U. S. C. C., D. (Ky.), 100 Fed. Rep. 922.

28. CORPORATIONS—New Company Formed by Consolidation.—A new corporation was formed by the consolidation of railroad companies under Minn. Spec. Laws 1881, chap. 113, providing for the manner of consolidation, the name of the new company, which might be "the name of either corporation party thereto or any other name," the transfer of the property or the old corporations, the retirement of their stock and the issue of the new stock, and for compensating the stockholders of the old corporations who decline to convert their stock into the stock of the new company.—MINNEAPOLIS & ST. LOUIS RAILWAY v. GARDNER, U. S. S. C., 20 Sup. Ct. Rep. 656.

29. COURTS—Jurisdictions — Presumptions.—A court having power to appoint assignees in insolvency, it will be presumed that it acted within its jurisdiction in appointing a second, without any order appearing of record discharging the first, on the presumption that on making a second order the first was no longer in force.—FREEMAN v. SPENCER, Cal., 60 Pac. Rep. 979.

30. COVENANTS—Covenant Against Incumbrances—Assignment.—A complaint in an action against a grantor for breach of covenant, alleging that a third person had the paramount and lawful right and title to the premises, to the hostile assertion of which title plaintiff had been compelled to yield, does not assign a breach of the covenant against incumbrances, but merely a breach of the statutory covenant of warranty implied in the words "grant," "bargain," and "sell."—HARAN v. STRATTON, Ala., 27 South. Rep. 648.

31. CREDITORS' BILL—Accounting.—A general creditor of a deceased person cannot sustain a bill in equity on a purely legal demand, unless he shows that he has exhausted his legal remedy, or that such remedy, for some good cause, would be inadequate or unavailing.—HALE v. WHITE, W. Va., 35 S. E. Rep. 884.

32. CREDITORS' BILL—Subrogation.—When a bank which is a party to a creditors' bill against a depositor pays the deposit to the latter, it is subrogated to the rights of the depositor, and may avail itself of any defense existing in her behalf.—A. T. ALBRO CO. v. FOUNTAIN, N. Y., 57 N. E. Rep. 72.

33. CRIMINAL EVIDENCE — Rape — Character of Accused.—In a prosecution for rape, it was error to allow the State to ask defendant's character witnesses whether they would consider his character good or bad if it should develop that the supreme court had granted his wife a divorce for cruel and inhuman treatment, and had stated, in their judgment that defendant had struck, choked, injured, and had frequently threatened to kill the wife and her child.—PEOPLE v. ELLIOTT, N. Y., 57 N. E. Rep. 103.

34. CRIMINAL LAW—Assault and Battery—Former Adjudication.—A judgment in a superior court in favor of defendant in a combined action for assault and battery and slander is not *res judicata* of plaintiff's claim for damages for slander, since the superior courts of Indiana have no jurisdiction of actions of slander.—MCCARTY v. KINSEY, Ind., 57 N. E. Rep. 108.

35. CRIMINAL LAW—Assault with Intent to Rob.—An indictment for assault with intent to commit robbery which after the date and venue, charges that defendant "in and up C did make an assault, and did then and there, by said assault, and by violence upon the said C, and putting the said C in fear of life and bodily injury," attempt to fraudulently take from him certain property, with intent to appropriate it, etc., contains a sufficient allegation of the assault to sustain a judgment of conviction; the expression "in and up C" being rejected as surplusage.—CLARK v. STATE, Tex., 56 S. W. Rep. 621.

36. CRIMINAL LAW—Homicide—Indictment.—Since a double murder may be committed by one and the same act, an indictment charging two distinct murders in but one count is valid on its face, and is not demurrable.—WILKINSON v. STATE, Miss., 27 South. Rep. 639.

37. CRIMINAL LAW—Indictment—Joinder of Offenses.—An indictment may allege both burglary and larceny in the same count, and may join two counts, one for "breaking and entering," and another for "entering without breaking."—STATE v. FLANAGAN, W. Va., 35 S. E. Rep. 862.

38. CRIMINAL LAW — Perjury.—In a prosecution for perjury, where the crime was alleged to have been committed at a trial held by a justice of the peace in a district in which he had no jurisdiction, a peremptory instruction for defendant was proper.—STATE v. TATE, Miss., 27 South. Rep. 619.

39. CRIMINAL LAW—Polluting Water Course—Indictment.—Though generally sufficient to charge in an indictment an offense in the words of a statute, yet if this does not sufficiently define the particular wrongful act, and give notice to the defendant of the offense he is required to meet—the particular criminal act in its essentials—the statute words must be expanded by such specification of the essentials as will define the offense with particularity.—STATE v. MITCHELL, W. Va., 35 S. E. Rep. 845.

40. CRIMINAL LAW—Rape—Evidence.—Where an indictment charged defendant with unlawful sexual intercourse with another on a certain date, it is error, the reputation of defendant not being in issue, to permit the prosecution to prove seven separate offenses of the same nature, on the theory that the prosecuting attorney might rely on any one of the offenses proven to secure a conviction.—PEOPLE v. FLAHERTY, N. Y., 57 N. E. Rep. 73.

41. DEDICATION—Ejectment.—The fact that one who made a dedication of property to a city afterwards received a quitclaim deed for the same property from H, and gave a quitclaim deed thereto to the plaintiff, does not show that H was the common source of the title of the plaintiff and the city, as a quitclaim deed does not show that the grantee did not have a prior title to the property.—VILLAGE OF NORTH CHILLICOTHE v. BURR, Ill., 57 N. E. Rep. 32.

42. DEED—Building Restrictions—Injunction.—Relief will not be denied to a plaintiff because he has erected a porch in front of his residence, and within the prescribed distance from the street, when the purpose of the covenant is to secure and preserve the desirability of the street for private residence, and the porch does not substantially interfere with the easement of neighboring proprietors for light, air, and view.—MCGUIRE v. CASKEY, Ohio, 57 N. E. Rep. 53.

43. DEED — Delivery.—To constitute a delivery of a deed, the grantor must by act or word, or both, part with all right of possession and dominion over the instrument with the intent that it shall take effect as his deed.—GAINES v. KEENER, W. Va., 35 S. E. Rep. 856.

44. DEED—Reformation — Mistake.—If a deed made under a prior executory contract varies therefrom, it is presumed that the deed, so far as it departs from such contract, represents a change agreed upon by the parties from the terms of the prior contract, and the deed represents the final contract of the parties, and such contract and all antecedent propositions, negotiations, and parol interlocutions on the same subject are merged in the deed. It may, however, be shown that such variance is due to a mistake in drawing the deed by such evidence as the law in such case requires.—KOEN v. KEENS, W. Va., 35 S. E. Rep. 902.

45. EQUITY—Pleading — Reference.—Where a demurrer to a bill in equity is overruled, and no day is given the defendant in which to answer, the court cannot properly order a reference of the cause to a commissioner to ascertain the amount of the plaintiff's demand, where the object of the bill to subject land to sale is to ascertain the liens thereon and their priorities.—BILLINGSLEY v. MANEAR, W. Va., 35 S. E. Rep. 847.

46. EXECUTION — Clerk's Signature.—An execution signed by a deputy clerk for a clerk of the court, whose term expired several months prior to the issuance of the execution, is void, under Code Civ. Proc. § 682, declaring that an execution shall be sealed with the seal of the court and subscribed by the clerk; and a purchaser at a sale had under a levy based on such execution acquires no title to the property, so as to enable him to question a conveyance thereof by the judgment debtor, as fraudulent.—O'DONNELL v. MERGUIRE, Cal., 60 Pac. Rep. 981.

47. FEDERAL AND STATE COURTS—Priority of Jurisdiction.—The pendency in a State court of a suit by a creditor against a corporation, in which a receiver for the property of defendant has been appointed, does not deprive a federal court of jurisdiction to entertain a suit for the foreclosure of a mortgage on such property by a mortgagee who is not a party to the suit in the State court, although no action will be taken in such suit which will interfere with the possession of the State court, and a decree for the sale of the property under the mortgage, if entered, will not be executed, so long as such possession continues.—METROPOLITAN TRUST CO. v. LAKE CITIES ELEC. RY. CO., U. S. C. C., D. (Ind.), 100 Fed. Rep. 897.

48. FEDERAL COURTS—Effect of Prior Decision on Error to the State Court.—A decision by the Supreme Court of the United States affirming a decision of a State court that upheld a State statute of limitations, the constitutional validity of which was dependent upon the existence of some precedent or coincident remedy, must be regarded as expressly deciding that such remedy exists, and cannot be disregarded as a precedent in a later case on writ of error to a lower federal court, on the theory that the existence of such remedy was merely assumed by the Supreme Court of the United States in the former case because it was bound in that particular to follow the decision of the State court, but is not so bound in a case arising in a federal court.—SARANAC LAND & TIMBER CO. v. ROBERTS, U. S. S. C., 20 Sup. Ct. Rep. 642.

49. FEDERAL OFFICERS—Removal of Defendant to Another District.—Under Rev. St. § 1014, which constitutes the only authority for the arrest and removal to another district for trial of a person there charged with an offense against the United States, the proceeding before a commissioner for the commitment of a person so arrested is the same as that prescribed by the laws of the State for proceedings before an examining magistrate; the only issue before the commissioner being as to whether there is probable cause to believe the defendant guilty of the offense charged. The evidence admissible upon that issue is determined by the State practice, and as, under the statute of New York, the defendant is entitled to produce the testimony of witnesses, or any other competent evidence in his behalf, the exclusion of such evidence by a commissioner in that State is unwarranted.—UNITED STATES v. GREENE, U. S. D. C., S. D. (N. Y.), 100 Fed. Rep. 941.

50. FRAUD—Diligence—Limitation of Actions.—Under Gen. St. Kan. 1897, ch. 95, § 12, providing that an action for relief on the ground of fraud must be brought within two years after the discovery of the fraud, an action for the recovery of money paid for the purchase of notes and mortgages, on the ground of false representations as to the value of the security and the solvency of the mortgagors, is barred after two years from the date of the purchase of the mortgages, in the absence of any allegation and proof that the fraud complained of could not, with due diligence, have been discovered within that time. The running of the statute in such case is not suspended until after foreclosure, and the measure of plaintiff's damage determined by judicial proceedings.—THAYER v. KANSAS LOAN & TRUST CO., U. S. C. C. of App., Eighth Circuit, 100 Fed. Rep. 901.

51. FRAUDS, STATUTE OF — Contract not to be Performed within One Year.—Where there was testimony tending to show that the contract sued on was to have been performed within one year, it was error to give a peremptory instruction for defendant, on the ground that the contract was within the statute of frauds.—REYNOLDS v. WISCONSIN CHAIR CO., Ky., 56 S. W. Rep. 658.

52. FRAUDULENT CONVEYANCES—Consideration.—If a person, to avoid threatened liability, convey his real estate to his brother to secure a *bona fide* indebtedness, and such brother, after all danger of such liability has passed, reconvey such real estate, the creditors of such brother, although he be heavily involved, who have not acquired the right in some manner to charge their debts against such real estate during the time the title thereto vested in their debtor, cannot attack such reconveyance as voluntary, fraudulent, and void as to their debts.—FARMERS' BANK OF FAIRMONT v. GOULD, W. Va., 35 S. E. Rep. 878.

53. FRAUDULENT CONVEYANCE — Evidence.—Where a conveyance of a deed of trust is given by a debtor to one who is a near relative, and thereby the debtor largely disables himself from paying his debts, and such conveyance or deed of trust is attacked as fraudulent by creditors, the party claiming under it must fully and clearly establish a valuable consideration for it.—STAUFFER v. KENNEDY, W. Va., 35 S. W. Rep. 892.

54. HOMESTEAD—Trust Deed—Title of Purchaser.—A husband and wife were joint owners of a homestead consisting of two lots. After the death of the wife, leaving minor heirs, the husband gave a trust deed on the lot having the least value. Held, that one knowing the claim of the heirs of the wife on such property, who purchased it at a sale under the trust deed, acquired good title to the lot, as the husband was entitled to dispose of his homestead, and the claims of the heirs of the wife would be satisfied out of the remaining lot.—THOMPSON v. ROBINSON, Tex., 56 S. W. Rep. 578.

55. INJUNCTION — Cutting Timber.—Injunction will not lie to restrain one from entering on the real estate of another and cutting and removing the timber on such land, as there is an adequate remedy at law.—MEYERS v. HAWKINS, Ark., 56 S. W. Rep. 640.

56. INJUNCTION — Sale under Trust Deed.—Where there is an injunction against a sale under a deed of trust, if it is found that the debt due is less than the amount called for in such deed, there should not be an absolute dissolution of the injunction, but a decree should be entered fixing the amount due, and, in the discretion of the court, either dissolving the injunction as to that amount and dismissing the bill, or the court should retain the cause and enter a decree of sale under its supervision.—FRY v. OLD DOMINION BLDG. & LOAN ASSN. OF RICHMOND, VA., W. Va., 35 S. E. Rep. 842.

57. INSURANCE—Policy.—An agent of a fire insurance company, whose powers are to countersign, issue, and renew policies of insurance, may bind the company by an oral agreement to renew an existing contract of insurance.—SQUIER v. HANOVER FIRE INS. CO., N. Y., 57 N. E. Rep. 93.

58. INSURANCE POLICY — Performance of Conditions.—Where a party aver that he has performed all the conditions of a contract to be by him performed, his proofs upon the trial must show such performance, in order to entitle him to a recovery. Under such an averment it is not competent to prove a waiver of such conditions. If the waiver of conditions is relied upon, such waiver must be averred in the pleadings.—EUREKA FIRE & MARINE INS. CO. v. BALDWIN, Ohio, 57 N. E. Rep. 57.

59. LANDLORD AND TENANT—Oil Lease — Covenant.—In a lease for oil and gas there is an implied covenant of right of entry and quiet enjoyment for the purposes of the lease.—KNOTTS v. MCGREGOR, W. Va., 35 S. E. Rep. 899.

60. LANDLORD AND TENANT — Tenant's Assignment.—Where a lease is still in full force and effect during the occupation of premises by the tenant's assignee for the benefit of creditors, and such assignee might have been removed at any time by the landlord for his assignor's non-payment of rent, the landlord could not recover against the assignee for use and occupation of the premises, and hence his counterclaim against the assignee on such ground is unavailable.—WALTON v. STAFFORD, N. Y., 57 N. E. Rep. 92.

61. LIBEL—Limitations.—Where recovery was sought for libel predicated on a letter mailed to another State, to which defendant pleaded limitations, a demurrer to a replication setting up fraudulent concealment of such cause of action by the writer of such letter until within a year before suit was properly sustained, since such libel became complete on the opening and reading of the letter by the addressee, and no act of the writer in another State could constitute concealment of such letter or of its publication.—MCCARLIE v. ATKINSON, Miss., 27 South. Rep. 643.

62. LIBEL—Words Not Libelous Per Se.—A letter to plaintiff's creditor, that plaintiff was unable to pay his debt, and was preparing to leave the country, and if he did so the note would be worthless, was not libelous *per se*.—SANDERS v. EDMONSON, Tex., 56 S. W. Rep. 611.

63. LIFE INSURANCE — Incontestable — Policy.—The provision of a policy that it shall be incontestable "if the insured shall die three or more years after the date hereof, and after all due premiums shall have been received by the company," applies where the company seeks to avoid liability by virtue of a clause providing that the policy shall be void "if the insured dies in consequence of his own criminal action."—SUN LIFE INS. CO. v. TAYLOR, Ky., 56 S. W. Rep. 668.

64. LIFE INSURANCE—Insurance Payable After Term of Years.—Where a husband procures insurance on his life, payable to himself after a term of years, if he shall live so long, and, if not, then to his wife at his death, and, after paying premiums for some years, gives a premium note, which has a forfeiture clause therein more onerous, as against the interests of the wife, than

the forfeiture clause in the policy, such forfeiture clause in the note will not avail the insurance company, as against the wife, unless she assents thereto.—UNION CENT. LIFE INS. CO. v. BUXER, Ohio, 57 N. E. Rep. 66.

65. MALICIOUS PROSECUTION—Advice of Counsel.—The fact that defendant, sued for malicious prosecution, acted on the advice of counsel, does not constitute a defense, unless it clearly appears that he acted in good faith on such advice. Where there was evidence making the good faith of defendant sued for malicious prosecution, in instituting the prosecution, a question for the jury, a peremptory instruction in his favor, on the ground that he acted on the advice of counsel, is error, even if it was thought that probable cause was shown, since such question should have been submitted to the jury.—KEHL v. HOPE OIL MILL & COMPRESS CO., Miss., 27 South. Rep. 641.

66. MARRIED WOMEN—Action for Personal Injury.—A married woman may maintain an action in her own name, without her husband joining, for a personal injury, where he had deserted her a year before the accident, and she had not received support from him, or seen him after his desertion.—KOCH v. CITY OF WILLIAMSPORT, Penn., 46 Atl. Rep. 67.

67. MORTGAGE FORECLOSURE—Assignment of Mortgagor.—The court of common pleas has jurisdiction in the foreclosure of a mortgage, notwithstanding a previous assignment of the mortgagor for the benefit of creditors, in all cases where the remedy in the probate court is inadequate. And this is so where the assignment does not include all the property covered by the mortgage; or, as in this case, the mortgagor, after making the mortgage, has platted the land into lots and streets, and made of it an addition to a city, without the assent of the mortgagee, and disposed of some of the lots.—ROBINSON v. WILLIAMS, Ohio, 57 N. E. Rep. 55.

68. MORTGAGES—Growing Crop.—Where a receiver was appointed to take charge of a fruit crop standing and growing on mortgaged premises described in the complaint, and the complaint failed to describe such premises with sufficient exactness to warrant a lien or justify an order of sale, the order of appointment must be reversed, since there was no *res* of which possession could be taken.—SALISBURY v. WILCOX, Cal., 60 Pac. Rep. 979.

69. MORTGAGE—Payment—Volunteer.—Plaintiff, who, through no fault of his, was treated as dead throughout foreclosure proceedings, was not guilty of laches in allowing defendant to purchase lands and pay off a mortgage on the faith of such proceedings, when defendant might, with ordinary care, have learned of plaintiff's existence.—DEMOURELLE v. PIAZZA, Miss., 27 South. Rep. 623.

70. MUNICIPAL CORPORATIONS—Street Improvements—Contract.—Under St. 1891, pp. 199, 200, providing that the board of supervisors may award a contract for street improvements to the lowest responsible bidder, which award shall be approved by the mayor, or a three-fourths vote of the city council, where an award was approved by a three-fourths vote of the council an objection that the council had no right to act on the award until after it had been presented to the mayor, and he had refused to approve it, was untenable, since the approval was optional either with the mayor or council.—GREENWOOD v. MORRISON, Cal., 60 Pac. Rep. 971.

71. MUNICIPAL CORPORATIONS—Taxation of Farming Lands.—Under Const. § 171, providing that taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, farming lands within the limits of a town are subject to taxation by the town, whether or not they receive any benefit or protection from the municipal government.—TOWN OF CENTRAL COVINGTON v. PARK, Ky., 56 S. W. Rep. 650.

72. PARTNERSHIP—Assignment for Benefit of Creditors.—Where a partnership's personalty is assigned for the benefit of creditors, and realty belonging to one partner is conveyed to the assignee by deeds in aid of the assignment, the assignment and deeds are, in effect, but an assignment, and not a trust deed or mortgage, and it is immaterial that personalty was conveyed by one instrument and realty by the others.—UNION & PLANTERS' BANK v. ALLEN, Miss., 27 South. Rep. 631.

73. PRINCIPAL AND SURETY—Banks—Liability of Cashier's Sureties.—Where a bank cashier renewed his bond each year, and the directors published each year a report showing that all was right, the fact that they might, by slight diligence, have discovered at the end of the first year that the cashier had permitted large overdrafts, does not release the sureties from liability for overdrafts permitted in subsequent years.—GRANT COUNTY DEPOSIT BANK v. LITTELL'S EXCX., Ky., 56 S.W. Rep. 669.

74. RECEIVERS—Restraining Order—Dissolution.—A temporary restraining order granted on filing of complaint and affidavit, without notice to defendants, was properly vacated on motion, where the evidence showed that a receiver for the plaintiff had been theretofore appointed and had qualified in another case, since Code Civ. Proc. § 955, invests a receiver with power to sue in his own name, as receiver, and, in absence of a showing that such appointment was not in force, the affairs and property of plaintiff were *in custodia legis*, and plaintiff had no legal capacity to sue.—BOSTON & M. CONSOL. COPPER & SILVER MIN. CO. v. MONTANA ORE PURCHASING CO., Mont., 60 Pac. Rep. 990.

75. RELIGIOUS SOCIETIES—Church Property.—A deed of church property, to persons as trustees for the "Greek Catholic Church of Wilkesbarre, Pa., creates a trust for the church as it is then being conducted, there being nothing else to show what is the nature of its worship; and, it being conducted as a church of the "United Greek Catholic Church," it cannot afterwards be surrendered by part of its members to the "Orthodox Greek Catholic Russian Church."—GREEK CATHOLIC CHURCH v. ORTHODOX GREEK CHURCH, Penn., 46 Atl. Rep. 72.

76. SALES—Failure to Deliver Within the Time Fixed.—To entitle the seller to recover damages for the buyer's refusal to receive the goods, he must allege that they were tendered within the time fixed by the contract for delivery; and, even if the acceptance of a part of the goods after the time fixed for delivery could be regarded as a waiver of the right to refuse to receive the remainder of the goods because they were not delivered in time, yet it must be presumed, construing the petition of the seller most strongly against him, that the goods which he alleges were received by defendant were delivered within the time fixed by the contract, in the absence of an allegation to the contrary.—GOFF v. MARSDEN CO., Ky., 56 S. W. Rep. 667.

77. SALES—Parol Proof.—Where a letter from a seller to a buyer stated the seller's understanding of the buyer's order for goods, repeated an advertisement to accompany such goods, and asked the buyer to check it over carefully, and, if correct, sign a statement, indorsed thereon, that the same had been all checked over carefully and found correct in every particular, such letter and indorsement, on the signing of such statement by the buyer, completed the contract, and, in absence of fraud, is binding on the parties; and parol proof to change the terms thereof was improperly admitted.—COATES & SONS v. BACON, Miss., 27 South. Rep. 620.

78. SPECIFIC PERFORMANCE—Contract for Land.—A contract to purchase land will not be specifically enforced against the vendee, when the title is not marketable and cannot be made so except by successful litigation to remove a mortgage from record, especially when no affirmative action therefor can be taken because the mortgage is held by a State official on behalf of the State.—WESLEY v. EELLS, U.'S. S. C., 20 Sup. Ct. Rep. 661.

79. SUMMONS — Service.—Any credible person may serve a summons or other process, or legal notice, and

make verified return of such service, though there has not been any prior return of not executed by an authorized officer.—HOLLANDSWORTH v. STONE, W. Va., 35 S. E. Rep. 864.

80. SUMMONS—Writs—False Return.—Though there be a representative of defendant corporation within the State on whom service might have been had, yet, the the sheriff having made a return to the writ of *non est inventus*, action may be entered without service on defendant, and continued for notice to it by publication, if an actual attachment of its property within the jurisdiction has been made; and the action cannot be abated on this account, but the only remedy is by action against the sheriff for his false return.—NATIONAL BANK OF LEBANON v. MASCOMA FLANNEL CO., N. H., 46 Atl. Rep. 49.

81. TAXATION—Refrigerator Cars — Interstate Commerce.—The State may tax the average number of refrigerator cars used by railroads within the State, but owned by a foreign corporation which has no office or place of business within the State, and employed as vehicles of transportation in the interchange of interstate commerce.—UNION REFRIGERATOR TRANSIT COMPANY v. LYNCH, U. S. S. C., 20 Sup. Ct. Rep. 630.

82. TAX SALE—Redemption.—If real estate is sold for the non-payment of taxes thereon, and the right of redemption, under the statute, belongs to or accrues to an infant by reason of title vested, such right may be exercised in behalf of such infant during infancy, and by himself personally within 1 year after he becomes 21 years of age.—WHITE v. STRAUS, W. Va., 35 S. E. Rep. 843.

83. TELEGRAPH COMPANY—Special Delivery—Custom.—Where it was a telegraph company's custom that the receiving office shall notify the sending office of extra charges for special delivery, so that the sending office may secure payment or guaranty of them from the sender, such custom constitutes a part of the contract of transmission, and the question whether the company was guilty of negligence in failing to comply therewith is for the jury.—EVANS v. WESTERN UNION TEL. CO., Tex., 56 S. W. Rep. 609.

84. TRUSTS—Power of Trustee to Borrow Money.—Where no duty was imposed on a trustee which rendered it unnecessary for him to borrow money, a note executed by him, as trustee, for borrowed money, was nothing more than an individual obligation.—FARMERS' & TRADERS' BANK OF SHELBYVILLE v. FIDELITY & DEPOSIT CO. OF MARYLAND, Ky., 56 S. W. Rep. 671.

85. TRUST—Resulting Trust.—Under the General Statutes, a trust did not result in favor of plaintiffs where defendant took to himself the title to land which was paid for with money furnished by plaintiffs.—COLEMAN v. BOWLES' ADMR., Ky., 56 S. W. Rep. 651.

86. TRUST—Resulting Trust.—A resulting trust mu t arise at the time of the contract of purchase by virtue of the payment of the purchase money from the funds of the *cestui que trust*, or securing the same at that time to be thereafter paid, so as to make them a part of the contract of purchase.—MOORE v. MUSTOE, W. Va., 35 S. E. Rep. 871.

87. TRUST—Resulting Trust—Parent and Child.—To create a resulting trust in favor of a ward in a tract of land purchased by his guardian, the trust funds must either have been paid at the time of, or entered into the consideration for the contract of, purchase, though afterwards paid.—MYERS v. MYERS, W. Va., 35 S. E. Rep. 869.

88. UNITED STATES—Powers of National Government—Constitutional Limitation.—The government of the United States can exercise no powers except those delegated to it, either expressly or by necessary implication, by the constitution; hence the civil jurisdiction of the United States can only be exercised within territory over which the constitution is in force and within the limitation imposed by that instrument for the protection of personal and property rights.—EX PARTE ORITZ, U. S. C. C., D. (Minn.), 100 Fed. Rep. 955.

89. USURY — Evidence. — Where interest for two years, at the highest rate allowed by law, is added to the principal sum loaned, and the whole divided into 24 notes, of equal amount, one of which is made payable in each month during the two years, and to draw interest from maturity. the contract is usurious.—SPROULLE v. MCFARLAND, Tex., 56 S. W. Rep. 693.

90. USURY—Recovery — Limitation.—Where the purchasers of mortgaged land took up the mortgage notes executed by the vendor, and executed their individual note in lieu thereof, and also a new mortgage, the vendor's right to recover any usury embraced in the notes thus taken up then accrued, and was barred after the lapse of one year from that date, and therefore in an action on the new note, brought after that lapse of time, the obligors therein cannot set up the usury in the old notes as a defense, though the vendor joins with them.—PARKER v. ZWEIGART, Ky., 56 S. W. Rep. 678.

91. USURY — Third Person — Right to Plead.—Usury cannot be pleaded by a purchaser who assumes a usurious debt as part of the purchase price.—NORTH TEXAS SAV. & BLDG. ASSN. v. HAY, 56 S. W. Rep. 580.

92. VENDOR AND PURCHASER—Rights and Liabilities.—On principles of *quia timet* chancery will entertain a bill by a vendee of land against his vendor to compel the vendor to pay out of his own land liens binding the lands of both, where the vendor is insolvent except as to his land, and that may prove inadequate security.—WEEKLY v. HARDESTY, W. Va., 35 S. E. Rep. 880.

93. VENDOR'S LIEN—Enforcement—Parties.—In a suit to enforce a lien for purchase money of land by a holder of one note given therefor, holders of other notes equally secured by such lien are necessary parties.—MILLER v. MORRISON, W. Va., 35 S. E. Rep. 905.

94. WATERS—Surface Waters — Obstruction.—Where the natural flow of the water from plaintiff's land was over the land of defendant, the fact that plaintiff had constructed ditches, which, to some extent, increased the flow of water over defendant's land, did not give defendant the right to construct a dam so as to throw the water back upon plaintiff; but plaintiff, having sought equity, must do equity, and the chancellor, in requiring defendant to remove the dam, should require plaintiff to close the ditches, and restore the ground to its natural condition, as far as can reasonably be done.—GRINSTEAD v. SANDERS, Ky., 56 S. W. Rep. 665.

95. WILLS — Implied Power of Executor.—Under a will giving to testator's wife and daughter, so long as the wife lived and remained unmarried, one-third of the net rents and profits of all testator's real estate, after deduction of expenses of collection and of keeping the real estate in repair, and designating no one to ascertain such rents and profits, but authorizing his executors to sell any or all of his real estate, provided that the interest of his wife and daughter is to be secured in any of his real estate that may be sold, an implied power is given to executors to lease the lands and collect the rents.—PEIRCE v. PEIRCE, Penn., 46 Atl. Rep. 78.

96. WILLS—Valuation by Testator of Land Devised.—Where a testator fixes a value upon land devised, for the purpose of division under the will, the devisee must take the land at the value fixed.—CHAMBERLAIN v. BERRY'S EXR., Ky., 56 S. W. Rep. 639.

97. WITNESSES — Cross-Examination—Contradiction.—It is within the discretion of the court to permit a witness, called by the plaintiff and recalled by defendant, after he has entered upon his defense, after having been asked a question relating to a matter of defense which he answers adversely to the defendant, to be interrogated by defendant, with the latitude of cross-examination, to lay the foundation for the admission of prior contradictory statements, and also to admit such statements, for the purpose of showing the bias of the witness.—CLARY v. HARDEEVILLE BRICK CO., U. S. C. C., D. (S. Car.), 100 Fed. Rep. 915.